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# Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases

Marek Martyniszyn\*

## Abstract

Foreign states' amicus curiae briefs submitted before the U.S. courts are a special type of pleading. This article analyzes such submissions made in U.S. antitrust cases during the period 1978-2015, identifying which foreign nations used amicus briefs to present their views and what sort of issues attracted their attention. This piece examines also the issue of deference due to such filings, arguing that while foreign states' submissions should be treated respectfully, they do not warrant a dispositive effect. Furthermore, this article outlines the practice of filing, explaining the shift from diplomatic correspondence towards amicus curiae submissions and the creation of a niche market of authoring them. It also indicates general trends in relation to stages of filings and the degree of their prevalence. Some broader comments are offered on the functions of foreign nations' amicus filings and their contribution to the on-going development of competition law and policy internationally.

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## I. Introduction

Antitrust cases involving foreign defendants are not new to the U.S. courts. Some of them relate to transnational or purely foreign conduct affecting U.S. markets. Until relatively recently outside the U.S. there has been little appetite for and few actual cases of similar transnational enforcement of domestic competition laws.<sup>1</sup> In effect, the international competition law jurisprudence for a long time was shaped in actions before the U.S. courts.

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<sup>1</sup> The terms 'competition law', 'antitrust law', and 'antitrust' are used interchangeably. In many countries competition laws were introduced only in the last two decades. Papadopoulos shows that 63 countries adopted competition laws between 1991 and

Some of such cases involved active participation of foreign nations by means of amicus curiae briefs. An amicus brief is a submission of ‘a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in action because that person has a strong interest in the subject matter’.<sup>2</sup> Foreign states filed amicus briefs in some of the most controversial transnational antitrust cases of the last few decades, such as *Matsushita*,<sup>3</sup> *Hartford Fire*,<sup>4</sup> and *Empagran*.<sup>5</sup> In the contexts of these suits the amicus submissions received ample attention (of courts, the U.S. government, and commentators), but no attempt was made beforehand to identify and look at these filings in general, as a tool in itself.<sup>6</sup> It was unclear what informed such interventions, why the amicus form was used rather than diplomatic channels, and at what stage of the litigation the submissions were filed. The related questions concern the way amicus briefs are treated by the courts (including the issue of any deference due to such representations) and whether they matter.

This article makes an original contribution by supplementing the existing gap and casting light on foreign nations’ amicus curiae submissions in U.S. antitrust cases. In the period 1978-2015, 67 foreign nations’ participations by means of amicus briefs in 28 cases have been identified and analyzed. The European Commission emerges as the most frequent filer, followed by Canada and Japan. Analysis of the briefs indicates a few strands of cases which attracted the attention of foreign nations. These were cases dealing with the question of jurisdiction, discoverability of foreign leniency-related documents, foreign states’ implication in anticompetitive conduct, and regulation

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2000, and 18 states between 2001 and 2008 (by 2008 111 countries had competition laws). ANESTIS S. PAPADOPOULOS, *THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY* 16 (CUP 2010). Similarly, Waked provides that while before 1990 only 10 developing countries had competition laws, by 2007 that number had risen to 77. Dina I. Waked, *Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries*, 3 (2011), available at <http://ssrn.com/paper=2044047>. That said, regulation of anticompetitive conduct is a very old enterprise and it goes back to antiquity. See further ROMAN PIOTROWSKI, *CARTELS AND TRUSTS: THEIR ORIGIN AND HISTORICAL DEVELOPMENT FROM THE ECONOMIC AND LEGAL ASPECTS* (G. Allen & Unwin 1933).

<sup>2</sup> Bryan A. Garner, et al., *Black's Law Dictionary* 98 (West Group 9th ed. 2009).

<sup>3</sup> *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>4</sup> *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

<sup>5</sup> *F. Hoffmann- La Roche Ltd v. Empagran SA*, 542 U.S. 155 (2004).

<sup>6</sup> The literature review reveals that—in the period of the most serious jurisdictional clashes between the U.S. and its allies—one author wrote about foreign states’ participation in U.S. antitrust cases. See Judith Gelber, *Foreign Government Participation in United States Antitrust Litigation*, 15 *JOURNAL OF INTERNATIONAL LAW AND ECONOMICS* 605 (1981). For general literature on amicus filings before the U.S. courts see, for example, Kristen Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 *VIRGINIA LAW REVIEW* forthcoming (2016); Paul M. Collins, *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *LAW & SOCIETY REVIEW* 807 (2004); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 743 (2000); Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 1017 (1967); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *YALE LAW JOURNAL* 694 (1962).

of natural resources. While foreign nations submit amicus briefs to protect various features of their sovereignty and related prerogatives, it cannot be precluded that some submissions are primarily motivated by a willingness to shield home businesses from treble damages, which remain an internationally contentious and rather unique aspect of U.S. antitrust.

Foreign nations began communicating directly with U.S. courts due to a change in the Supreme Court's rules relating to such submissions, embraced also by the lower courts. Moreover, a few practitioners successfully developed a specific niche market of authoring and facilitating amicus filing, arguing that presentation of views by means of amicus submissions may be more effective than reliance on diplomatic correspondence. This development might have fueled an increasing interest in amicus briefs. Although foreign nations intervene at all stages of litigation, filings at the district court level are much more frequent than at higher levels. While typically governments file the briefs, submissions made by individual foreign ministries or competition agencies point to a new trend.

Although the extent to which courts actually defer to foreign states' submissions remains unknown, amicus briefs are an important type of pleadings. They can facilitate adjudication, especially in cases requiring consideration of foreign laws, procedures and policies. They constitute unilateral acts of states and when pertaining to issues of international law, they have the capacity to influence its development. Whether submitted out of a genuine sovereignty-related concern or being successfully solicited by defense counsel, foreign nations' amicus submissions should not be too easily discounted. Foreign states are no ordinary friends of the court. Courts are well-advised to deal with foreign states' amicus filings in an accommodating and respectful manner, even if only to secure similar treatment of the representations made by the U.S. executive in foreign fora.

Part II of this article outlines the scope of the project undertaken. Part III deals with the practice of amicus curiae filings. It explains the process towards their judicialization and the professionalization of their authoring, and it offers some further comments on stages of filing and such briefs' general prevalence. Part IV lists the identified cases and foreign states' filings, offering analysis in relation to which nations became the friends of the court and what sort of issues attracted their attention. This part examines also the question of whether any level of deference is due to foreign states' submissions, and what role the U.S. government plays in such cases. Part V

explores the legal and political functions of foreign states' amicus submissions. The conclusions underline the versatile nature of amicus briefs as an instrument and their input into the on-going discourse on and development of international and competition law.

## II. The scope of the project

This article investigates amicus briefs submitted by foreign nations in U.S. antitrust litigation, relying on a broad notion of a state encompassing not only governments in the strict sense, but also antitrust agencies (regardless of the level of autonomy they enjoy domestically, or the fact that they may be supranational, such as the European Commission). Submissions made by foreign states' subdivisions are not included, as they carry a lesser weight in the fields of international law and international relations.<sup>7</sup> Both formal and *de facto* amicus briefs are considered. The latter category includes statements in forms such as letters sent directly to a court, or documents attached to a party's own filing. Since these materials were considered by courts and drafted for such a purpose, they constitute *de facto* amicus briefs.

From a temporal perspective, this study focuses on briefs submitted in cases decided between 1978 and 2015. In 1978 an important policy change took place. Foreign nations were invited to communicate any concerns in relation to cases pending before the U.S court directly to them.<sup>8</sup> *Pfizer*,<sup>9</sup> decided by the Supreme Court in 1978, is the first case included in this study. Although preceding the formal policy change, *Pfizer* nevertheless demonstrates this approach with the German government filing an amicus brief directly before the Supreme Court. *Motorola Mobility*,<sup>10</sup> decided in early 2015, is the last case included.

A 'case' is understood as encompassing all instances of the litigation in a particular dispute. For example, *Hartford Fire*<sup>11</sup> is counted as one case, although the UK submitted amicus briefs both at the Court of Appeals and the Supreme Court levels. Similarly, all instances of presentation of views by the foreign state in the same case (as defined above) are counted as one participation. For

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<sup>7</sup> Such filings are relatively rare but not unusual. For example, the Canadian province of Saskatchewan submitted an amicus brief before the Supreme Court on a petition for a writ of certiorari in *Minn-Chem*. Brief for Amicus Curiae Her Majesty the Queen in Right of the Province of Saskatchewan, Canada, in Support of Petitioners, *Minn-Chem, Inc. v. Agrium, Inc.*, 2012 WL 6706582 (December 26, 2012).

<sup>8</sup> See Section III.1.

<sup>9</sup> *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978).

<sup>10</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015).

<sup>11</sup> *Hartford Fire*, *supra* n 4.

instance, although China submitted numerous statements in *Vitamin C*,<sup>12</sup> these are considered as one foreign nation's participation. Moreover, while there were some instances of joint amicus filings by foreign states, for the purpose of this research involvement of a particular state in a particular litigation is counted as one participation, irrespective of whether the representation was made by means of a brief filed singly or jointly.

### III. The practice of filing

#### 1. From diplomacy to judicialization

Traditionally, a foreign state when interested in bringing its views to the attention of a U.S. court regarding pending litigation would follow formal channels of inter-state communication. It would direct its diplomatic personnel accredited in the forum to pass on its views on the matter to the U.S. Department of State in the form of a diplomatic note (sometimes entitled a *Note Verbale* or *Aide Mémoire*). It would request that the note be passed to the court hearing the case.<sup>13</sup>

In the U.S. this practice changed in 1978. The direct stimulus came from *Zenith Radio Corp. v. U.S.*,<sup>14</sup> a case concerning authorization of a levy of countervailing duties on some Japanese imports to the U.S. When the case was pending before the Supreme Court, Japan and the delegation of the European Commission expressed their views on the matter in diplomatic notes, which—in line with the prevailing practice—were addressed to the State Department, requesting their transmission to the Supreme Court. The State Department passed the notes to the Solicitor General (SG), who in turn handed them on to the Court. The Japanese note supported the U.S. defendant. The SG, who presented it to the Court, was prosecuting the case. This led to some confusion in the Court.

While the notes were accepted, the Clerk of the Supreme Court informed the SG that such a manner of transmitting notes was not authorized by the Court's rules. He clarified that foreign states should in future make their representations to the Court in line with the Court's rules. This led to a policy change. In August 1978 the State Department informed the Chiefs of Missions in

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<sup>12</sup> In re Vitamin C Antitrust Litigation 2016 WL 5017312 (2nd Cir. 2016).

<sup>13</sup> For illustrative extracts from such diplomatic notes see, for example, George Winthrop Haight, *Extracts from some Published Material on Official Protests, Directives, Prohibitions, Comments, etc.*, 51 INTERNATIONAL LAW ASSOCIATION REPORTS OF CONFERENCES 565 (1964).

<sup>14</sup> *Zenith Radio Corp. v. U.S.*, 437 U.S. 443 (1978).

Washington<sup>15</sup> that foreign states should file amicus curiae briefs when wishing to communicate their views to the Supreme Court and the Courts of Appeal in relation to any pending cases.<sup>16</sup> The U.S. was to consent to such filings in any case in which it is a party. It was underlined that ‘in the unlikely event that any other party should decline to consent, the Supreme Court will almost certainly grant the motion of a foreign government for leave to file a brief.’<sup>17</sup> The State Department clarified it would no longer transmit diplomatic notes to courts. Yet, the notes were to remain an effective way of communicating foreign states’ views to the U.S. executive. The new policy also requested copies of any amicus filings to be sent to the State Department, although it is not clear whether this became a practice.

When the new policy was shaped, in June 1978, the Canadian embassy requested the State Department to pass Canadian views in a particular case to the district court hearing it.<sup>18</sup> The Department refused to do so, informing the embassy that the communication should be submitted directly to the court.<sup>19</sup> Later the Deputy Legal Adviser explained that while transmitting of diplomatic notes to courts was not being precluded, the Department would not expect to do so. Any such requests were to be reviewed on a case-by-case basis.<sup>20</sup> A decision not to transmit a diplomatic note was ‘not to be construed as a negative judgment on the merits of any issues raised’.<sup>21</sup>

Already under the new policy regime, in relation to *Conservation Council*<sup>22</sup> the Australian embassy formally requested the State Department to file a ‘suggestion of interest’ with the court, taking a stance on the contentious jurisdictional issue in line with the Australian position. The State

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<sup>15</sup> The heads of foreign states’ representations (embassies) to the U.S.

<sup>16</sup> The key extracts from the Solicitor General letter to the Legal Advisor of the State Department and the State Department diplomatic note addressed to the chiefs of foreign missions in Washington are reprinted in MARIAN LLOYD NASH, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW*: 1978 560-63 (Department of State 1980). Even before the policy change some foreign nations submitted amicus briefs directly to U.S. courts. For example, shortly before the policy shift, in August 1977, Germany filed a brief before the Supreme Court in *Pfizer*, an antitrust case dealing with the issue of whether a foreign government is ‘a person’ within the meaning of Section 4 of the Clayton Act for the purposes of bringing an action for damages. *Motion of the Federal Republic of Germany for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae, Pfizer Inc. v. Government of India* § 1977 WL 189363 (1977).

<sup>17</sup> NASH, *supra* n 16, at 560.

<sup>18</sup> *Shelter Realty Corp. v. Allied Maintenance Corp.*, 442 F.Supp. 1087 (S.D.N.Y. 1977).

<sup>19</sup> NASH, *supra* n 16, at 561-62.

<sup>20</sup> Marian Lloyd Nash, *Contemporary Practice of the United States Relating to International Law*, 73 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 669, 678-79 (1979).

<sup>21</sup> *Id.* at 679.

<sup>22</sup> *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America*, 518 F. Supp. 270, 275, n 8 (W.D. Pa. 1981).

Department responded that the case did not involve sufficiently direct or well-defined U.S. interests to warrant such filing and recommended Australia to file an amicus brief.

The new practice explicitly concerned foreign states' amicus submissions to the Supreme Court and the Courts of Appeal. A similar practice was followed before district courts. In *Matsushita*, in 1975—that is before the policy change—a Japanese ministry passed on its views to the District Court in a form of a letter transferred through the State Department.<sup>23</sup> For some time it was unclear, for the court,<sup>24</sup> whether the ministry's views should be considered as views of the Japanese government as a sovereign state. In 1980—after the policy change—this issue was addressed, in the positive, in a letter sent to the trial court by the Japanese ambassador.<sup>25</sup> The plaintiffs moved to strike the letter on the grounds that it was not transmitted through diplomatic channels.<sup>26</sup> The motion was denied. While recognizing that the State Department's new policy explicitly related to presentation of views before the Supreme Court and the Courts of Appeals, the Court found that 'in order to promote consistent practice' foreign states' views should be communicated directly also to the district courts. Since there is no equivalent of an amicus brief in the Federal Rules of Civil Procedure, the Court found the form of a letter entirely appropriate.<sup>27</sup>

The change of policy on the proper way of communicating foreign states' views in cases pending before the U.S. courts reflected the growing consensus in the U.S. administration that there was no reason (both from international and domestic perspectives) why foreign nations should not present their views directly to U.S. courts.<sup>28</sup> The new policy allowed the administration to remain formally uninvolved. It decreased the political pressure on the U.S. government to take a position on a matter involved, judicializing the process. While the administration retains its right to intervene if needs be—by filing its own brief—the new policy liberated the executive from the need to get involved in every case. It is also a more efficient arrangement, saving the administration's resources without constraining its capacity to act. Foreign states remain free to

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<sup>23</sup> *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 513 F.Supp. 1100 (E.D. Pa. 1981).

<sup>24</sup> *Id.* at 1192, n 121.

<sup>25</sup> The Japanese statement, the ambassador's letter and other related official correspondence was appended to the Japanese brief. See Brief of the Government of Japan as Amicus Curiae in Support of the Petition for A Writ of Certiorari, *Matsushita Electric Industrial Co. v. Zenith Radio Corp. (Matsushita)*, No. 83-2004, 1984 WL 565880 (U.S., July 6, 1984).

<sup>26</sup> Alternatively, they asked for its exclusion under Rule 403 of the Federal Rules of Evidence. The Court found this request to be without merits.

<sup>27</sup> *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, *supra* n 23, at 1192, n 121.

<sup>28</sup> Nash, *supra* n 20, at 679.



use diplomatic channels to lobby the U.S. government to step in, supporting their interests. Since the noninvolvement became a default rule, any positive response of the U.S. government to foreign states' requests may be seen as a friendly gesture reinforcing pre-existing relationships and perhaps calling for reciprocation by supporting U.S. interests abroad.

## **2. Professionalization and authoring of briefs**

The diplomatic notes traditionally filed with the State Department were diplomatic documents. Albeit often carrying informed protests, these were rather short and polite statements of concern.<sup>29</sup> The judicialization of the process of presenting foreign states' views in pending cases<sup>30</sup> led also to a change of format and style. The amicus briefs became often well-researched and structured pieces of legal writing, containing developed argumentation and including appropriate references to relevant primary (both foreign and U.S. case law and legislation) and secondary sources. They began to resemble more journal articles (also in terms of length) than previously used diplomatic notes. This change was positive as courts are better equipped to deal with legal writing than with diplomatic statements, and their main function is adjudication, not diplomacy.

The new policy on presentation of foreign states' views in the form of amicus briefs also triggered professionalization of authoring. The policy effectively required hiring local legal counsel. This allowed for the creation of a niche amicus authoring and facilitating market. It can be argued that the market was developed by two practitioners—Mark R. Joelson and Joseph P. Griffin from Morgan, Lewis & Bockius LLP, a Washington-based law firm. They represented interests of the UK<sup>31</sup> and Australia from the mid-70s until the late 90s in cases before the U.S. courts, including in such important litigations as *Uranium*,<sup>32</sup> *Matsushita*,<sup>33</sup> and *Hartford Fire*.<sup>34</sup> In the earlier part of that period the UK was the most active amicus filer (among foreign states), and

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<sup>29</sup> For example, Germany filed a *Note Verbale* with the State Department in relation to a proper relief for Clayton Act violations by a U.S. subsidiary of a German car maker. Besides voicing German concerns the note contained the following passages: 'The Embassy has of course no intention to influence the determination of American courts on matters within their competence and therefore limits comment to the proposal mentioned above... The Embassy repeats that it has no desire to interfere in a pending procedure before American courts. It would however be grateful if the above mentioned arguments could be brought to the attention of the appropriate authorities.' Reprinted in *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F.Supp. 1219, 1226 (C.D. Cal. 1979).

<sup>30</sup> See Section III.1.

<sup>31</sup> Joelson was later accorded the Order of the British Empire (OBE) by the Queen for his service to the UK. See <https://www.law.georgetown.edu/faculty/joelson-mark-ren.cfm#>.

<sup>32</sup> *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).

<sup>33</sup> *Matsushita*, *supra* n 3.

<sup>34</sup> *Hartford Fire*, *supra* n 4.

in this sense Joelson and Griffin developed the market. They also filed the first ever joint amicus of foreign nations, in *Matsushita*.<sup>35</sup> Douglas Rosenthal—the former Chief of Foreign Commerce Section of the DoJ’s Antitrust Division, later partner in Coudert Brothers, then in Sonnenschein Nath & Rosenthal and finally in Constantine Cannon law firms—is another practitioner, whose name recurs on the list of foreign states’ amicus counsel. For instance, Rosenthal represented interests of Canada in *Hartford Fire*<sup>36</sup> and of Japan in the *Empagran*<sup>37</sup> and *Monosodium Glutamate*<sup>38</sup> litigations.

These attorneys had and further developed significant expertise in issues on the interface of antitrust and international commerce. They were a natural port of call for foreign nations wishing to have their views well-represented before U.S. courts. Apart from these three practitioners the servicing of briefs largely varied, also in terms of hired law firms.

One strand of cases capturing foreign nations’ attention concerned the issue of extraterritorial jurisdiction. After this issue in the antitrust context was, at least tentatively, resolved in *Empagran*,<sup>39</sup> numerous foreign nations continued to challenge U.S. extraterritorial assertions, albeit now in relation to the Alien Tort Statute’s cases.<sup>40</sup> The UK became most active. Its interests are represented by Donald I. Baker. Baker is a former acting-head of the DoJ’s Antitrust Division. Earlier in the career, when he was an Assistant Attorney General, Baker was one of the co-authors of the U.S. amicus brief in *Pfizer*. In 2005 Baker co-founded Baker & Miller, a law firm specializing in competition law and policy as well as in issues of international law. He seems to have taken over facilitating amicus filings of the the UK, after Joelson and Griffin retired.<sup>41</sup> It is noteworthy that some of the arguments regarding extraterritoriality furthered by joined foreign

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<sup>35</sup> *Matsushita*, *supra* n 3.

<sup>36</sup> Rosenthal provided antitrust and international legal advice to the government of Canada for twenty years. See <http://www.constantinecannon.com/attorneys/drosenthal.php>.

<sup>37</sup> *Empagran*, *supra* n 5. See n 95.

<sup>38</sup> *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir. 2007).

<sup>39</sup> *Empagran*, *supra* n 5. See n 95.

<sup>40</sup> See discussions in Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 835 (2013); Alan O Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEORGETOWN LAW JOURNAL 2161 (2011); William S Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME LAW REVIEW 1577 (2014).

<sup>41</sup> Baker also represented other governments, acting as a counsel on numerous joined amicus submissions involving the UK. For example, he represented the UK and Australia in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and in *Sarei v. Rio Tinto*, 550 F.3d 822 (9th Cir. 2008) and the UK and the Netherlands in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

states amici in *Empagran*<sup>42</sup> (as well as the way they were developed) were very similar to those presented at around the same time by the joined foreign states amici (Australia, the UK, and Switzerland) in *Sosa*,<sup>43</sup> in which case foreign amici were represented by Baker.

### 3. Solo v joint submissions

Amicus briefs can be submitted singly (by one state) or jointly (by numerous states). The latter is a rarer practice, but a joint submission may be seen as carrying a greater weight than separate filings, since it represents a common position. This is especially so when the brief deals with points of international law, which are shaped by state practice.<sup>44</sup>

The first joint foreign states' amicus submitted before the U.S. courts (in any field of law) was the brief of four governments—Australia, Canada, France and the UK<sup>45</sup>—submitted to the Supreme Court in *Matsushita*.<sup>46</sup> Interestingly, unlike the Japanese submissions in this case, the joint brief did not deal with the subject-matter of the case. It focused on the issue of deference due to foreign states' amicus submissions.<sup>47</sup> The broadest in authorship—in an antitrust case—was the joint brief submitted by five governments—Germany, Japan, the Netherlands, Switzerland, and the UK<sup>48</sup>—on remand in *Empagran*.<sup>49</sup> In that case foreign states submitted also two other joint briefs to the Supreme Court (see Table 1 below). But for these four joint briefs, in *Matsushita*<sup>50</sup> and *Empagran*,<sup>51</sup> no other joint foreign states' amicus submissions in antitrust cases were identified.

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<sup>42</sup> Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, *F. Hoffmann- La Roche Ltd v. Empagran SA*, 2004 WL 226597 (U.S. 2004). Compare Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as Amici Curiae in Support of Defendants-Appellees in *F. Hoffmann- La Roche Ltd v. Empagran SA* (Empagran II), 2005 WL 3873712 (C.A.D.C. 2005).

<sup>43</sup> Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Petitioner, *Sosa v. Alvarez-Machain*, Nos. 03-339, 03-485 (U.S. January 23, 2004).

<sup>44</sup> See below notes 175-180, 183 and accompanying text.

<sup>45</sup> Motion for Leave to File Brief Amici Curiae and Brief of the Governments of Australia, Canada, France, and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (Matsushita), 1985 WL 669665 (U.S. 1985).

<sup>46</sup> *Matsushita*, *supra* n 3.

<sup>47</sup> For discussion see below notes 127-132 and accompanying text.

<sup>48</sup> Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as Amici Curiae in Support of Defendants-Appellees in *F. Hoffmann- La Roche Ltd v. Empagran SA* (Empagran II), *supra* n 42.

<sup>49</sup> *F. Hoffmann- La Roche Ltd v. Empagran SA* (Empagran II), 417 F.3d 1267 (C.A.D.C. 2005).

<sup>50</sup> *Matsushita*, *supra* n 3.

<sup>51</sup> *F. Hoffmann- La Roche Ltd v. Empagran SA* (Empagran II), *supra* n 49.

Despite raising similar arguments foreign governments often submit amicus briefs singly. That was the case, for example, in *Spectrum Stores*,<sup>52</sup> in which numerous foreign states made individual filings, while raising very similar arguments.

**Table 1 Foreign States and the U.S. Amicus Curiae Briefs in *Empagran***

Briefs submitted before the Supreme Court	<ul style="list-style-type: none"> <li>• <b>Supporting the petition for a writ of certiorari</b> <ul style="list-style-type: none"> <li>• Brief of Germany</li> </ul> </li> <li>• <b>Submitted at the merits stage</b> <ul style="list-style-type: none"> <li>• Joint brief of Germany and Belgium</li> <li>• Brief of Canada</li> <li>• Brief of Japan</li> <li>• Joint brief of the UK, Ireland and the Netherlands</li> </ul> </li> </ul>
Briefs submitted before the Court of Appeals on Remand	<ul style="list-style-type: none"> <li>• Joint brief of Germany, the Netherlands, Japan, Switzerland, and the UK</li> <li>• Brief of Canada</li> </ul>

#### **4. Stages of amicus filings and their general prevalence**

There are two noticeable general trends pertaining to foreign nations' amicus filings. First, although in the examined cases foreign states filed amicus briefs at all stages of litigation (see Table 2 below), filings made at the district court level were most frequent. This may be seen as rather unexpected, especially given that the U.S. government rarely files amicus briefs in the lower courts. The early engagement has the benefit of informing adjudication early on, potentially influencing the litigation so as to avoid reaching any contentious outcomes. Additionally, the more recent amicus submissions by foreign antitrust agencies often concerned discovery, hence a matter dealt with at the early stage of litigation.

Second, the new millennium marks a growing number of foreign states' amicus filings, as compared to the earlier period (nine cases involving 18 instances of foreign nations' amicus participation prior to 2000 versus 19 cases with 49 instances of foreign states' amicus participation since then). The increasing foreign nations' participation seems to reflect the general growth in transnational antitrust cases as well as the rising interest worldwide in regulating private anticompetitive conduct. In relation to the latter, one should note that from the beginning of the

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<sup>52</sup> *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011).

new millennium antitrust agencies from a significant number of countries (at present, over 130 jurisdictions) began cooperating informally within the framework of the virtual International Competition Network, disseminating knowhow and good practices.<sup>53</sup> This platform of cooperation helps to build trust between regimes. By doing so, it may be also, albeit inadvertently, encouraging foreign nations to file amicus briefs in the U.S. courts with the hope that U.S. courts will be as receptive and sensitive to arguments as the U.S. officials taking part in the working of the ICN. Overall, these phenomena mean that transnational enforcement in the U.S. is now more likely to be of particular interest in foreign capitals. This trend is likely to continue and one should expect more foreign nations' amicus filings in the U.S courts in the future.

**Table 2 Amicus Filings at Different Stages of Litigation**

No	Year	Case Name	District Ct	Ct Appeals	S Ct—Cert	S Ct—Merits	Ct A—on remand
1	1978	Pfizer Inc. v. Government of India			✓		
2	1980	In re Uranium Antitrust Litigation	✓	✓			
3	1981	Conservation Council of Western Australia, Inc. v. Alcoa	✓				
4	1983	Washington Public Power Supply System v. Western Nuclear	✓				
5	1986	Matsushita Electric Industrial Co. v. Zenith Radio Corp.	✓		✓	✓	
6	1990	Karsten Mfg. Corp. v. U.S. Golf Ass'n	✓				
7	1993	Rivendell Forest Products Ltd. v. Canadian Forest Products Ltd.	✓				
8	1994	Hartford Fire Insurance Co. v. California		✓	✓		
9	1997	US v. Nippon Paper Industries Co.		✓			
10	2002	In re Vitamins Antitrust Litigation	✓				
11	2002	In re: Methionine Antitrust Litigation	✓				
12	2003	Prewitt Enterprises, Inc. v. OPEC	✓	✓			
13	2004	F. Hoffmann- La Roche Ltd v. Empagran			✓	✓	✓
14	2004	In re Automotive Refinishing Paint Antitrust Litigation		✓			
15	2004	Intel Corp. v. Advanced Micro Devices Inc.			✓		
16	2005	U.S. v. Gosselin World Wide Moving, N.V.			*		
17	2006	Stolt-Nielsen S.A. v. U.S.			*		
18	2007	In re Monosodium Glutamate Antitrust Litigation		✓			
19	2007	In re Rubber Chemicals Antitrust Litigation	✓				
20	2007	Goss Intern. Corp. v. Man Roland Druckmaschinen AG		✓			
21	2008	In re Vitamin C Antitrust Litigation	✓	✓			

<sup>53</sup> For discussion from various perspectives see Paul Lugard, *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Intersentia 2011).

22	2008	In re Chocolate Confectionary Antitrust Litigation	✓					
23	2010	In re Payment Card Interchange Fee Antitrust Litigation	✓					
24	2011	Spectrum Stores, Inc. v. Citgo Petroleum Corp.	✓	✓				
25	2011	In re TFT-LCD (Flat Panel) Antitrust Litigation	✓					
26	2011	In re Air Cargo Shipping Services Antitrust Litigation	✓					
27	2012	In re Flat Glass II Antitrust Litigation	✓					
28	2015	Motorola Mobility LLC v. AU Optronics Corp.	✓	✓				

\* Brief filed in support of petitions for the grant of certiorari. The writ was not granted.

## IV. Analyzing the briefs

The identification of antitrust cases in which foreign nations submitted amicus briefs is one of the original contributions of this research.<sup>54</sup> No other similar listing existed before or was publicly available. Although the amicus briefs, unless filed under seal, are public documents, this does not translate into ease of access, which is hindered by lack of comprehensiveness of the legal research databases, especially regarding the district courts level and also, in general, older cases.<sup>55</sup> Some of the older filings are retrievable through the U.S. National Archives<sup>56</sup> or were reprinted in secondary sources.

In the analysed period (1978-2015) 28 cases were identified (see Table 3 below). There were in total 67 instances of foreign states' amicus curiae participations. The number of cases represents only a fraction of all transnational cases decided by the U.S. courts.<sup>57</sup> While the collected data is not dispositive, it is suggestive. *Spectrum Stores*<sup>58</sup> is the case with the highest number of foreign nations' amicus participations (13 states filed briefs).

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<sup>54</sup> The presented listing was composed after analysing judgements (and dockets), available online, in antitrust cases involving transnational elements. Three leading legal databases were used: BlumbergLaw, LexisNexis and Westlaw. Members of the U.S. and International Advisory Boards of the Institute for Consumer Antitrust Studies at the Loyola University Chicago were consulted about the list in a crowd-sourcing exercise. Although every effort was made to identify all relevant briefs, the list is likely to undercount them, especially those filed in the earlier part of the analysed period.

<sup>55</sup> Similar limitations apply to the Public Access to Court Electronic Records (PACER) system. PACER is not a unified database. Each court maintains its own holdings. Available filings range from copies of docket lists to copies of some or all briefs. PACER covers only up to the last fifteen years.

<sup>56</sup> Courts hand over older case files to the U.S. National Archives and Records Administration (NARA), some of which are retained. None are being digitalized. NARA has numerous branches in the U.S. The holdings are available only locally and there are no inter-branch loans.

<sup>57</sup> It is unclear how many such cases were decided in that period.

<sup>58</sup> *Spectrum Stores*, *supra* n 52.

**Table 3 List of identified antitrust cases in which foreign states' filed amicus briefs (1978-2015).**

No	Year	Case Name	Citation	Foreign States which filed amicus briefs before		
				the District Court	the Court of Appeals	the Supreme Court
1	1978	Pfizer Inc. v. Government of India	434 U.S. 308	-	-	Germany
2	1980	In re Uranium Antitrust Litigation	617 F.2d 1248	Australia, Canada, South Africa, Switzerland	Australia, Canada, South Africa, UK	-
3	1981	Conservation Council of Western Australia, Inc. v. Alcoa	518 F.Supp. 270	Australia	-	-
4	1983	Washington Public Power Supply System v. Western Nuclear	No. C81-1362M (W.D. Wash., 1983)	UK	-	-
5	1986	Matsushita Electric Industrial Co. v. Zenith Radio Corp.	475 U.S. 574	Japan	-	Australia, Canada, France, Japan, UK
6	1990	Karsten Mfg. Corp. v. U.S. Golf Ass'n	728 F.Supp. 1429	UK	-	-
7	1993	Rivendell Forest Products Ltd. v. Canadian Forest Products Ltd.	810 F.Supp. 1116	Canada	-	-
8	1994	Hartford Fire Insurance Co. v. California	509 U.S. 764	-	UK	Canada, UK
9	1997	US v. Nippon Paper Industries Co.	109 F.3d 1	-	Japan	-
10	2002	In re Vitamins Antitrust Litigation	2002 WL 34499542	EC, Australian ACCC†, Canada	-	-
11	2002	In re: Methionine Antitrust Litigation	2002 U.S. Dist. LEXIS 27122	EC	-	-
12	2003	Prewitt Enterprises, Inc. v. OPEC	353 F.3d 916	Austria, Kuwait, Saudi Arabia, Nigeria, Mexico	Austria, Mexico, Nigeria, Saudi Arabia, Venezuela	-
13	2004	F. Hoffmann- La Roche Ltd v. Empagran	542 U.S. 155	-	Canada, Germany, Japan, the Netherlands, Switzerland, UK (all submitted on remand)	Belgium, Canada, Germany, Ireland, Japan, the Netherlands, UK
14	2004	In re Automotive Refinishing Paint Antitrust Litigation	358 F.3d 288	-	Germany	-
15	2004	Intel Corp. v. Advanced Micro Devices Inc.	542 U.S. 241	-	-	EC
16	2005	U.S. v. Gosselin World Wide Moving, N.V.	411 F.3d 502	-	-	Belgium*
17	2006	Stolt-Nielsen S.A. v. U.S.	442 F.3d 177	-	-	Luxembourg*
18	2007	In re Monosodium Glutamate Antitrust Litigation	477 F.3d 535	-	Japan	-
19	2007	In re Rubber Chemicals Antitrust Litigation	486 F.Supp.2d 1078	EC	-	-
20	2007	Goss Intern. Corp. v. Man Roland Druckmaschinen AG	491 F.3d 355	-	Japan	-
21	2008	In re Vitamin C Antitrust Litigation	584 F. Supp. 2d 546	China	China	-

22	2008	In re Chocolate Confectionary Antitrust Litigation	2008 WL 4960194	Canada	-	-
23	2010	In re Payment Card Interchange Fee Antitrust Litigation	2010 WL 3420517	EC	-	-
24	2011	Spectrum Stores, Inc. v. Citgo Petroleum Corp.	632 F.3d 938	Algeria, Angola, Iraq, Kuwait, Mexico, Nigeria, Norway, Qatar, Russia, Saudi Arabia, United Arab Emirates, Venezuela	Algeria, Indonesia, Iraq, Kuwait, Mexico, Nigeria, Qatar, Russia, Saudi Arabia, United Arab Emirates, Venezuela	-
25	2011	In re TFT-LCD (Flat Panel) Antitrust Litigation	2011 WL 723571	EC, JFTC	-	-
26	2011	In re Air Cargo Shipping Services Antitrust Litigation	2011 WL 2909162	EC	-	-
27	2012	In re Flat Glass II Antitrust Litigation	2012 WL 5383346	EC	-	-
28	2015	Motorola Mobility LLC v. AU Optronics Corp.	773 F.3d 826	Japan	Japan, Taiwan, KFTC, Belgian NCA	-

<sup>†</sup> Australian Competition and Consumer Commission (ACCC) did not file a formal amicus brief. The defendants submitted an affidavit of ACCC's Chief Executive Officer. Since this was a statement created for the purposes of that litigation, it is as a *de facto* amicus brief.

\* Brief filed in support of petitions for the grant of certiorari. The writ was not granted.



While foreign states' amicus briefs are rare, they are becoming more frequent. In the first two decades of the analysed period transnational antitrust cases were quite sporadic. If one looks at the public enforcement efforts then, international cartels—arguably the most common transnational antitrust violation—became a central focus of the DoJ Antitrust Division only in 1996.<sup>60</sup> Beforehand, the prosecutions involving foreign firms were less frequent, reflecting the general retrenchment of antitrust enforcement in the Reagan administration (1981-1989).<sup>61</sup> In 1991 only one percent of all corporate defendants in cases brought by the Division were foreign. In the period 1987-1990 the Division did not bring any case against a foreign entity,<sup>62</sup> whereas in the 1990s the U.S. authorities successfully prosecuted 26 international cartels.<sup>63</sup>

Therefore, in the analysed period a significant shift took place in the focus of investigations—from domestic to transnational antitrust violations. It also coincided with the emergence of the international consensus, in the 1990s, on the harmful nature of international hard-core (price-fixing, or markets dividing) cartels and the spread of competition legislation around the globe. This was followed, in the next decade, by growing and intensifying inter-agency cooperation.<sup>64</sup>

The number of private actions involving foreign defendants—as compared with public actions—would be higher. Private suits, which characterize the U.S. antitrust enforcement,<sup>65</sup> are driven by the prospects of treble damages awards<sup>66</sup> and not by any comity considerations.

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<sup>60</sup> In this vein Hammond, pointing to the prosecution of the international lysine cartel as the turning point. Scott D. Hammond, *Charting New Waters in International Criminal Prosecutions*, 1 (Address at the National Institute on White Collar Crime, March 2, 2008), available at <http://www.justice.gov/atr/public/speeches/214861.pdf>. The growth in the number of prosecutions of international cartels was an effect of securing foreign firms' and witnesses' cooperation through plea agreements, thereby obtaining access to foreign-based evidence. Gary R. Spratling, *Negotiating the Waters of International Cartel Prosecutions*, 1 (Thirteenth Annual National Institute On White Collar Crime, March 4, 1999), available at <http://www.justice.gov/atr/public/speeches/2275.pdf>.

<sup>61</sup> The Division was more active in the period preceding the Reagan administration. For example, there were eight cases of international horizontal price-fixing in the 1970s, but only three such cases in the 1980s. See Joseph C Gallo, et al., *Department of Justice Antitrust Enforcement, 1955—1997: An Empirical Study*, 17 REVIEW OF INDUSTRIAL ORGANIZATION 75, 80, 98-99 (2000).

<sup>62</sup> Spratling, Attachment 1: Status Report On International Cartel Enforcement, *supra* n 60.

<sup>63</sup> That is a number of private international hard-core cartels. See Table 1 in Margaret C. Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L. J. 801 (2004).

<sup>64</sup> Both formally, under the negotiated (usually bilateral) agreements, as well as informally, within the framework of virtual networks between agencies. See PAPADOPOULOS, *supra* n 1, at 145-204; Imelda Maher & Anestis S. Papadopoulos, *Competition Agency Networks Around the World*, in INTERNATIONAL RESEARCH HANDBOOK ON COMPETITION LAW (Ariel Ezrachi ed., Edward Elgar 2012).

<sup>65</sup> The place of the private suits in the U.S. antitrust regime was best encapsulated by the Supreme Court—'the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws'. *Perma Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968).

<sup>66</sup> See below notes 79-80 and accompanying text.

Therefore, the likelihood of causing international tension and provoking foreign nations to participate as amici is greater, and—as discussed below—most of the identified foreign states’ briefs were filed in private suits, be it stand alone or follow-on cases.<sup>67</sup>

When it comes to public enforcement foreign states’ interests would often have been taken into account on an *a priori* basis. In cases brought by the U.S. antitrust agencies, which exercise prosecutorial discretion, there is scope for filtering out potential friction.<sup>68</sup> Any remaining controversies (in the perception of other nations) would concern issues in regard to which the U.S. authorities had particularly strong views. This may explain why there were only three cases of public enforcement involving foreign states’ amicus submissions (see Table 7 below), including only one criminal case—*Nippon Paper*.<sup>69</sup>

The impact of the foreign states’ amicus briefs in particular cases is difficult to appraise. Courts do not state the reasons for their judgments in an unambiguous manner. They also tend not to ascribe any particular weight to amicus filings when a case outcome is amicus-friendly. Nevertheless, even in cases in which courts did not discuss or refer to amicus briefs in their opinions, it cannot be ruled out that arguments raised in such submissions did influence their judgement.

## 1. Who are the foreign amici?

In most of the analysed cases the foreign states which participated as amicus curiae were developed nations.<sup>70</sup> The European Commission was the most frequent filer (eight participations), followed

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<sup>67</sup> This point was made recently by the Japanese Ministry of Economy, Trade and Industry (METI) in its brief submitted in *Motorola Mobility*, in which it opposed extraterritorial assertions sought by the private plaintiffs. The METI observed that ‘giving private U.S. attorneys, which do not bear responsibility in international diplomacy and cooperation, the right to interfere with Japanese governmental regulation of the Japanese market is troublesome.’ Brief of the Ministry of Economy, Trade and Industry of Japan As Amicus Curiae in Support of Defendants’ Motion for Reconsideration, *Motorola Mobility LLC v. AU Optronics Corp.*, 2014 WL 5422011, 6 (7th Cir. 2014).

<sup>68</sup> The U.S. government in its Supplemental Brief in *Motorola Mobility* argued that ‘The United States carefully considers international comity and exercises prudence before bringing any antitrust enforcement actions that might implicate the interests of a foreign jurisdiction.’ Supplemental Brief for the United States and the Federal Trade Commission as Amici Curiae, *Motorola Mobility LLC v. AU Optronics Corp.*, Docket No 14-08003, Entry No 57, 10 (7th Cir. June 27, 2014). This point was cited in the court’s opinion. See *Motorola Mobility*, *supra* n 10. *Motorola Mobility*, arising from a foreign price-fixing of components subsequently implemented in goods sold in the U.S. and elsewhere, serves as a good illustration. Although four foreign nations intervened as amici in this case protesting against extraterritorial assertions sought in this private action for damages (see notes 97-105 and accompanying text.), none of them opposed the U.S. criminal prosecution of firms and foreign executives involved. See *United States v. Hui Hsiung*, 758 F.3d 738 (9th Cir. 2015).

<sup>69</sup> *U.S. v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997).

<sup>70</sup> The phrase ‘developed nations’ is used deliberately to describe a group of developed and newly industrialized countries more closely interlinked through trade and investment flows, rather than any geographical indication. This group includes countries in

by Canada and Japan (seven participations each) and the UK (six participations). There were only four cases in which other states submitted briefs. Firstly, there was South Africa's participation in the *Uranium* litigation,<sup>71</sup> a litigation ongoing in the late 70s, alongside Australia, Canada and the UK. Secondly, there were two *OPEC* cases (*Prewitt*<sup>72</sup> and *Spectrum Stores*<sup>73</sup>), decided in 2003 and 2011, in which a number of petroleum producing nations participated. Finally, there was also the recent *Vitamin C* case,<sup>74</sup> in which China filed amicus briefs—for the first time ever before a U.S. court.

**Table 4 Foreign States Amici: in Search for the Most Frequent Filer**

Foreign State	Number of cases in which it participated
EC	8
Canada, Japan (including JFTC)	7
UK	6
Australia (including ACCC),	4
Belgium (including the Belgian Competition Authority), Germany	3
Kuwait, Mexico, Nigeria, Saudi Arabia, Switzerland, Venezuela	2
Algeria, Angola, Austria, China, France, Indonesia, Iraq, Ireland, Korea (KFTC), Luxembourg, Netherlands, Norway, Qatar, Russia, South Africa, Taiwan, United Arab Emirates	1

One possible partial explanation of the more frequent submissions of developed nations in antitrust cases is the fact that firms operating in such states would more often do business in and affect the markets of the U.S. than firms based in other parts of the world. Hence, developed nations had more interests at stake. This might partly reflect the North-South divide—between nations in which firms have the capacity to trade globally, and the rest of the world.

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North America, Europe, and East and Southeast Asia (including Korea and Taiwan, but not China), as well as Australia and New Zealand.

<sup>71</sup> See notes 112-113 and accompanying text.

<sup>72</sup> *Prewitt Enterprises v. OPEC* (Prewitt II), 353 F.3d 916 (11th Cir. 2003).

<sup>73</sup> *Spectrum Stores*, *supra* n 52.

<sup>74</sup> *In re Vitamin C Antitrust Litigation*, *supra* n 12.

From a practical perspective one is likely to sue a foreign entity only when the prospects for successful enforcement (effective relief) are realistic. One of the greatest challenges of transnational litigation is gaining access to evidence, which may be located abroad. This applies to both public and private enforcement.<sup>75</sup> In the former case, until the late 1990s—in order to obtain evidence and facilitate effective investigation of international cartels—the DoJ was often settling for fines instead of seeking indictments in exchange for cooperation (‘no-jail’ deals).<sup>76</sup>

In the private actions context, prior to bringing a case plaintiffs need to consider, apart from the issue of handling discovery, the potential for recovery of any damages awards. When foreign entities have assets in the U.S., this issue is generally not problematic.<sup>77</sup> In rarer cases—where there are no assets in the U.S. from which the plaintiffs could collect, the situation gets more complex. Under international law there is no obligation to recognize and enforce foreign money judgments. The U.S. concluded no agreement on mutual recognition and enforcement of judgments.<sup>78</sup> Hence, this is a matter to be determined by a foreign court in the state of the sought recognition. Moreover, the U.S. is one of just a few jurisdictions worldwide which provide for multiple damages awards.<sup>79</sup> Internationally (even among U.S. allies) there has been and still remains a level of mistrust towards U.S. treble damages awards.<sup>80</sup> It seems reasonable to expect

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<sup>75</sup> For analysis in the context of transnational public enforcement see Marek Martyniszyn, *Inter-Agency Evidence Sharing in Competition Law Enforcement*, 19 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF 11 (2015).

<sup>76</sup> First time announced in *Spratling*. This policy changed in the late 1990s. In the international vitamin cartel case—for the first time—a foreign national participating in an international cartel agreed to serve a jail sentence. *Plea Agreement, United States v. Sommer*, Crim. No. 3:99-CR-201-R, para 9 (N.D. Tex. 1999), available at <http://www.justice.gov/atr/cases/f2400/sommer.pdf>. Since then DoJ always required foreign cartelists to serve sentences. The DoJ Antitrust Division also started looking for extradition of foreigners. The first successful extradition on an antitrust charge took place on 3 April 2014. The Division managed to extradite an Italian national from Germany, who subsequently pleaded guilty and was sentenced to serve two years in prison for participating in the international marine hose cartel. U.S. Department of Justice, *Former Marine Hose Executive Who Was Extradited to United States Pleads Guilty for Participating in Worldwide Bid-Rigging Conspiracy* (April 24, 2014), available at [http://www.justice.gov/atr/public/press\\_releases/2014/305376.pdf](http://www.justice.gov/atr/public/press_releases/2014/305376.pdf). In 2010 the Division secured its first ever extradition of a foreigner—a British national Ian Norris—in the carbon products price-fixing investigation. Yet, Norris was extradited on obstruction of justice, not antitrust charges. For more on that case and the scope for extradition in antitrust see Philipp Girardet, ‘What if Uncle Sam wants you?’: *Principles and Recent Practice Concerning US Extradition Requests in Cartel Cases*, 1 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 286 (2010).

<sup>77</sup> The situation may be more complicated if the anticompetitive conduct is attributable to a foreign sovereign itself. For discussion see Marek Martyniszyn, *FOREIGN STATE’S ENTANGLEMENT IN ANTICOMPETITIVE CONDUCT* (2015).

<sup>78</sup> See <http://travel.state.gov/content/travel/english/legal-considerations/judicial/enforcement-of-judgments.html>.

<sup>79</sup> Multiple damages awards are also available in private actions, for example, in Taiwan (Art. 32 of the Fair Trade Act) and in Panama (Art. 30 of the Law 45/2007 on the Protection and Defence of Competition).

<sup>80</sup> For example, the German Supreme Court held that multiple damages awards could not be enforced in Germany, given their punitive nature; and refused to recognise a judgement of the Superior Court of the State of California. Bundesgerichtshof [BGH] 4 June 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 312 (F.R.G.). Similarly, punitive damages are not available in Japan. The Japanese Supreme Court refused to recognize and enforce the part of the U.S. damages award which was exemplary and punitive finding that it would be against Japanese public policy. *Ore. State Union No-so-kon I v. Mansei Kogyo Co.*, Judgment of Supreme Court on July 11, 1997, Minshu 51-6-2573. In fact, in the past many states introduced legislation

that successful recovery is more likely in a forum which has a generally similar regulatory system to the U.S. Therefore, few foreign nations' amicus filings of other than developed nations reflect generally lower numbers of private actions brought against defendants based in such states, which can be partly explained by a lower likelihood of effective recovery.

Some of the foreign states' briefs were filed not by the foreign governments in the strict sense, but by individual ministries,<sup>81</sup> raising the question of the attributability of the represented views to respective states. Under customary international law 'the conduct of any organ of a state must be regarded as an act of that state'.<sup>82</sup> Yet, there may be more complex situations (for example, involving assertions contradicted by acts or policies of other organs of the same state) necessitating particular prudence in their treatment.<sup>83</sup>

Albeit most of the analysed amicus briefs were submitted by foreign nations, the most frequent filer was the European Commission (eight participations), acting in its capacity as the competition agency of the European Union. These submissions represent a new phenomenon, emerging in recent years, of foreign competition agencies beginning to use amicus briefs to communicate their views directly to U.S. courts. Such agencies tend to enjoy at least a certain, and in some jurisdictions a considerable, degree of independence from home governments and therefore their representations are particularly noteworthy. Apart from the EC, amicus briefs were submitted also by Australian, Belgian, Japanese and Korean competition agencies.

The representations made by the agencies tend to be less formalistic than those made by governments. Foreign agencies often present their views in letters to the judge hearing the case. These are *de facto* amicus briefs. Agencies probably opt for such a form because it is more expeditious and cheaper than filing a formal amicus. Moreover, a formal brief may necessitate

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blocking recognition and enforcement of multiple damages awards and even introduced provisions allowing for recovery of any damages paid under such judgments. Much of such legislation was introduced in response to the *Uranium* litigation. For analysis see Marek Martyniszyn, *Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order*, 37 WORLD COMPETITION 103 (2014).

<sup>81</sup> For example, that was the case with the submission by the Japanese Ministry of International Trade and Industry in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.* and with the communications by the Chinese Ministry of Commerce in *Vitamin C*, Jury Verdict, In re Vitamin C Antitrust Litigation, *supra* n 74. See notes 137-141, 24-27 and accompanying text.

<sup>82</sup> Difference Relating to Immunity from Legal Process of a Special Rapporteur, [1999] ICJ Rep, para 62.

<sup>83</sup> See further discussion of deference due to amicus briefs in Section 3.

going through a more stringent intra-agency process, whereas submission of a letter to a judge may only require the attention of a head of unit within the agency.

Submissions of foreign antitrust agencies are another indicator of continuing juridification of transnational legal disputes. They suggest growing trust in and progressing understanding of each other's legal processes. To file a brief, a foreign agency must have a certain level of trust in U.S. procedures and believe that a U.S. court will consider its arguments. Otherwise, it would likely seek an intervention at the executive level with a view to soliciting U.S. government intervention before the court hearing the case.

## 2. Distinguishable strands of cases

Analysis of foreign states' amicus submissions from the perspective of their focus allows the identification of a few general strands of cases. These are cases dealing with: (1) jurisdiction and permissible limits of transnational application of U.S. antitrust laws, (2) discoverability of documents related to foreign antitrust investigations,<sup>84</sup> (3) foreign states' involvement in anticompetitive conduct, (4) regulation of exploitation of natural resources (see Table 5 below).

**Table 5 Issues Raised in Foreign States' Amicus Briefs**

No	Year	Case Name	No of Intervening foreign states	Jurisdiction (as such)	Jurisdiction (limits)	Jurisdiction (personal)	Jurisdiction (enforcement)	Discoverability	State Involvement	Natural Resources	Deference	Other issues
1	1978	Pfizer Inc. v. Government of India	1									✓
2	1980	In re Uranium Antitrust Litigation	5	✓			✓		✓	✓		
3	1981	Conservation Council of Western Australia, Inc. v. Alcoa	1	✓								
4	1983	Washington Public Power Supply System v. Western Nuclear	1	✓								
5	1986	Matsushita Electric Industrial Co. v. Zenith Radio Corp.	5	✓					✓		✓	
6	1990	Karsten Mfg. Corp. v. U.S. Golf Ass'n	1			✓						
7	1993	Rivendell Forest Products Ltd. v. Canadian Forest Products Ltd.	1		✓							
8	1994	Hartford Fire Insurance Co. v. California	2	✓	✓							

<sup>84</sup> This category is distinguished here as a separate one, although it is—in essence—a special case of the limits of enforcement jurisdiction in the transnational context.

9 1997 US v. Nippon Paper Industries Co.	1	✓	✓						
10 2002 In re Vitamins Antitrust Litigation	3					✓			
11 2002 In re: Methionine Antitrust Litigation	1					✓			
12 2003 Prewitt Enterprises, Inc. v. OPEC	6			✓			✓	✓	
13 2004 F. Hoffmann- La Roche Ltd v. Empagran	8		✓						
14 2004 In re Automotive Refinishing Paint Antitrust Litigation	1			✓					
15 2004 Intel Corp. v. Advanced Micro Devices Inc.	1					✓			
16 2005 U.S. v. Gosselin World Wide Moving, N.V.	1		✓						
17 2006 Stolt-Nielsen S.A. v. U.S.	1								✓
18 2007 In re Monosodium Glutamate Antitrust Litigation	1		✓						
19 2007 In re Rubber Chemicals Antitrust Litigation	1					✓			
20 2007 Goss Intern. Corp. v. Man Roland Druckmaschinen AG	1			✓					
21 2008 In re Vitamin C Antitrust Litigation	1						✓		✓
22 2008 In re Chocolate Confectionary Antitrust Litigation	1					✓			
23 2010 In re Payment Card Interchange Fee Antitrust Litigation	1					✓			
24 2011 Spectrum Stores, Inc. v. Citgo Petroleum Corp.	13						✓	✓	
25 2011 In re TFT-LCD (Flat Panel) Antitrust Litigation	2					✓			
26 2011 In re Air Cargo Shipping Services Antitrust Litigation	1					✓			
27 2012 In re Flat Glass II Antitrust Litigation	1					✓			
28 2015 Motorola Mobility LLC v. AU Optronics Corp.	4		✓						

Foreign states filed briefs in antitrust cases before U.S. courts when their important interests were at stake. In most, if not all, cases such an interest was, in essence, the protection of foreign states' own prerogatives—their power to regulate and govern activities of their subjects in a sovereign manner. This was the issue in all the cases focusing on extraterritoriality in antitrust.<sup>85</sup> Various states, especially the UK, argued against extraterritorial application of U.S. antitrust laws, always noting that the conduct at stake was already regulated in the defendants' home jurisdictions. They perceived U.S. extraterritoriality—the reaching for foreign defendants with often no presence or no business in the U.S.—as encroaching on their powers; a *de facto* exportation of U.S. legislation. From this perspective, they argued—at least initially—in favour of an international legal order of exclusive and exhaustive jurisdiction of states rather than an order of overlapping and concurrent powers. The more recent submissions call more for a greater accommodation of each other's important interests, implicitly recognizing that concurrent jurisdiction is here to stay.

<sup>85</sup> In similar vein DOUGLAS E. ROSENTHAL & WILLIAM M. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY 9-10 (the Royal Institute of International Affairs, Routledge & Kegan Paul 1982).

Similar reasoning applies to recent cases dealing with discoverability of leniency-related materials. The amici argued that the sought discovery would undermine their own important policies—their leniency programs.<sup>86</sup> Similar considerations were raised in cases concerning state involvement in the challenged conduct or in actions concerning exploitation of natural resources. In these latter few cases the opposition against applicability of U.S. antitrust laws to such activities was particularly forceful.

The protection of one's own prerogatives was not undertaken for its own sake. The legislative choices and policies have clear impact on national economies. The acceptance of foreign prescriptions may negatively affect the competitiveness of domestic businesses. It creates an additional cost. Moreover, in the context of U.S. antitrust actions, it is also the question of exposure to private suits and treble damages, which may not be available in the foreign defendants' home states.<sup>87</sup> In fact, some foreign nations' amicus curiae submissions may be, in essence, mercantilist. They may be motivated directly by the interests of defendants. The amicus briefs may be submitted in order to shield the foreign defendants from liability in the U.S., even if their conduct was anticompetitive. From a pragmatic perspective, fines or damages in a transnational context represent a transfer of wealth from home to a foreign jurisdiction and therefore should be avoided. Given the significant inter-linkages between major economies, it is unlikely that any nation would be pursuing a purely mercantilist agenda, yet its echoes may nevertheless be heard in some acts or policies, including in representations made in the form of amicus curiae briefs. Suffice it to note that although there is now an international consensus as to the harmful nature of price-fixing agreements, most jurisdictions (including the U.S.) tolerate, if not encourage, export cartels, that is anticompetitive agreements which affect only foreign markets.<sup>88</sup> Such considerations need to be taken into account when analyzing amicus curiae briefs of foreign nations.

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<sup>86</sup> See below n 106.

<sup>87</sup> Many jurisdictions which enacted and enforce competition laws do not provide for their private enforcement, relying exclusively on public enforcement efforts. The European Union only recently created the general framework facilitating pursuit of private damages claims arising from anticompetitive conduct. European Commission, *IP/14/1580, Antitrust: Commission Welcomes Council Adoption of Directive on Antitrust Damages Actions* (November 10, 2014), available at [http://europa.eu/rapid/press-release\\_IP-14-1580\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1580_en.htm).

<sup>88</sup> For discussion see Marek Martyniszyn, *Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law*, 15 J. INT'L ECON. L. 181 (2012).



## 2.1. Extraterritoriality and jurisdictional limits

Application of U.S. antitrust law in a transnational context—to foreign entities—was the issue which led to multiple foreign states’ amicus filings. Initially these submissions aimed at opposing U.S. extraterritorial assertions in antitrust based on the *Alcoa*’s effects doctrine<sup>89</sup> as such. The UK was particularly active in this regard. The recurring objections to U.S. jurisdictional assertions are not surprising from the international law perspective, since a protest to be effective (and have the capacity of preventing recognition of a new customary norm) must be maintained and actively manifested.<sup>90</sup> Later a shift took place from contesting extraterritoriality in itself towards demarking its internationally permissible limits. In other words, U.S. extraterritoriality in antitrust gradually became uncontested.

*Hartford Fire*<sup>91</sup> and *Nippon Paper*<sup>92</sup> are the last cases in which extraterritoriality itself was challenged. *Hartford Fire* was a civil case brought by 19 U.S. states and private plaintiffs after the DoJ declined to prosecute it.<sup>93</sup> *Nippon Paper* was the first criminal case in which antitrust laws were applied extraterritorially in circumstances when all the relevant conduct took place outside the U.S.<sup>94</sup> In later cases, as exemplified by *Empagran*,<sup>95</sup> the courts have dealt with more complicated factual and legal situations.

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<sup>89</sup> United States v. Aluminium Company of America (*Alcoa*), 148 F.2d 416 (2nd Cir. 1945). In *Alcoa*, a case concerning an international cartel of aluminum producers, Judge Learned Hand formulated the effects doctrine by famously stating it was ‘settled law’ that states may apply their laws to foreign entities for their foreign conduct if it affects the domestic market, thereby setting a precedent and allowing for a far-reaching transnational enforcement of U.S. antitrust laws. The holding in *Alcoa* was, most likely, contrary to international law, yet at that time no foreign state protested. Rosenthal and Knighton noted that ‘until a decade after *Alcoa* was decided, the [U.S.] was virtually alone in promoting the effects doctrine as a valid basis for claiming the right to apply its antitrust law to regulate conduct beyond its borders. Virtually every other developed nation was in opposition.’ ROSENTHAL & KNIGHTON, *supra* n 85, at 3.

<sup>90</sup> See below n 179 and accompanying text.

<sup>91</sup> *Hartford Fire*, *supra* n 4.

<sup>92</sup> *Nippon Paper*, *supra* n 69.

<sup>93</sup> Michael F Brockmeyer, *State Antitrust Enforcement*, 57 ANTITRUST L. J. 169 (1988).

<sup>94</sup> Joseph P. Griffin, *Foreign Governmental Reactions to US Assertions of Extraterritorial Jurisdiction*, 19 ECLR 64, 68-69 (1998).

<sup>95</sup> *Empagran*, *supra* n 5. The case arose from private class actions against an international price-fixing vitamin cartel, following successful public enforcement in the U.S. and other jurisdictions. The question was whether U.S. jurisdiction extends to claims of foreign purchasers from a global cartel that operated also in the U.S. In other words, whether the doors to the U.S. courtrooms (and treble damages awards) are open to all victims of global conspiracies. The Supreme Court had to construe the 1982 Foreign Trade Antitrust Improvements Act. Ultimately, the Court answered in the negative, in line with representations made by numerous foreign states’ amici, although it delivered its ruling in the context of a carefully and very narrowly framed scenario.

In the longer-term the trend to further challenge the limits of extraterritoriality in antitrust is bound to continue, since—as earlier indicated<sup>96</sup>—the generous U.S. rules on damages and plaintiffs-friendly discovery provide strong incentives for private plaintiffs to keep testing them. Amicus briefs will remain a tool which foreign states will be using to intervene and protest when deemed necessary.

The recent *Motorola Mobility* case is the best example of this with four foreign nations getting involved as amici curiae. The U.S. plaintiff sued foreign cartelists for fixing prices of components which were incorporated by the plaintiff's foreign affiliates into products which were subsequently sold by the plaintiff in the U.S. As in *Empagran*<sup>97</sup> the crux was the interpretation of the poorly worded Foreign Trade Antitrust Improvement Act (FTAIA). The case first led to the filing of an amicus brief by the Japanese Ministry of Economy, Trade and Industry (METI) arguing against the extraterritorial assertions sought by the plaintiff.<sup>98</sup> The District Court found that under the FTAIA U.S. jurisdiction does not extend to such claims.<sup>99</sup> The decision was affirmed on interlocutory appeal.<sup>100</sup> Finding to the contrary would have—in Judge Posner's words—'enormously increase[d] the global reach of the Sherman Act, creating friction with many foreign countries'.<sup>101</sup>

The decision was later vacated and rehearing was ordered. This led to further interventions of foreign nations. The Taiwanese Ministry of Economic Affairs and the Korean Fair Trade Commission filed briefs opposing the far-reaching extraterritorial assertions as sought by the plaintiff.<sup>102</sup> Notably, the defendants in this case were based in these three foreign jurisdictions. Afterwards, the Belgian Competition Authority also made a submission, joining the foreign amici

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<sup>96</sup> See above text accompanying n 65.

<sup>97</sup> *Empagran*, *supra* n 5.

<sup>98</sup> Brief of the Ministry of Economy, Trade and Industry of Japan As Amicus Curiae in Support of Defendants' Motion for Reconsideration, *Motorola Mobility LLC v. AU Optronics Corp.*, 2013 WL 7098182 (N. D. Ill. 2013).

<sup>99</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 2014 WL 258154 (N. D. Ill. 2014).

<sup>100</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014).

<sup>101</sup> *Id.* at 846.

<sup>102</sup> Brief of the Ministry of Economic Affairs, Republic of China, Taiwan, *Motorola Mobility LLC v. AU Optronics Corp.*, Docket No 14-08003, Entry No 47 (7th Cir. February 25, 2014); Brief of the Korea Fair Trade Commission as Amicus Curiae in Support of Appellees' Opposition to Rehearing *En Banc*, *Motorola Mobility LLC v. AU Optronics Corp.*, 2014 WL 2583475 (7th Cir. 2014).

in their opposition.<sup>103</sup> The Japanese METI filed another brief.<sup>104</sup> The case involved also the U.S. government's foreign amici participation in support of neither party. Ultimately, the Seventh Circuit affirmed its earlier opinion.<sup>105</sup> In an amicus-friendly manner, the plaintiff was found to be unable to sue foreign price-fixers under U.S. antitrust law for overcharges paid by its foreign subsidiaries in relation to their foreign transactions. However, the Court's reading of the FTAIA does not, in any way, limit the scope for extraterritorial application of U.S. antitrust law by the government agencies in such cases.

## **2.2. Discoverability of documents related to foreign proceedings**

The emergence of foreign antitrust agencies' amicus curiae submissions is a new development. Within the analyzed period ten cases involved such representations (see Table 6 below). But for *Intel v. AMD* and *Motorola Mobility*, foreign agencies—mostly, but not only the European Commission—filed briefs at the district court level. All submissions but for two (both filed in *Motorola Mobility*) concerned discoverability of documents related to foreign amici's own antitrust investigations within the framework of leniency programs.<sup>106</sup> The foreign amici participated to protect their policies' credibility. The documents, in which discoverability for the sake of U.S litigation was contested, while held by the parties were at the same time considered at least confidential in the foreign fora. As noted above, in a broader sense the issue of discoverability falls within the notion of enforcement jurisdiction.<sup>107</sup>

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<sup>103</sup> Brief of the Belgian Competition Authority as Amicus Curiae in Support of Appellees' Position Seeking Affirmation of the District Court's Order, *Motorola Mobility LLC v. AU Optronics Corp.*, 2014 WL 5422010 (7th Cir. 2014).

<sup>104</sup> Brief of the Ministry of Economy, Trade and Industry of Japan As Amicus Curiae in Support of Defendants' Motion for Reconsideration, *Motorola Mobility LLC v. AU Optronics Corp.*, *supra* n 67.

<sup>105</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 773 F.3d 826 (7th Cir. 2014). This decision was amended and superseded by *Motorola Mobility*., cert. denied 135 S.Ct. 2837 (Mem).

<sup>106</sup> Leniency programs incentivise members of anticompetitive practices to cooperate with antitrust agencies in exchange for more lenient treatment or full immunity. Nicolo Zingales, *European and American Leniency Programmes: Two Models Towards Convergence?*, 5 COMPETITION LAW REVIEW 5 (2008).

<sup>107</sup> Hence it also raises the question of the permissible limits of U.S. extraterritorial jurisdiction, albeit in its enforcement and not in the prescriptive sense.

**Table 6 Foreign Antitrust Agencies as Amicus Curiae before U.S. Courts**

No	Year	Case Name	Amicus	Did U.S. file a brief?	Was it amicus-friendly?	Was the case outcome Amicus-friendly?
1	2002	In re Vitamins Antitrust Litigation	EC, ACCC <sup>†</sup>	✗		?
2	2002	In re: Methionine Antitrust Litigation	EC	✗		✓
3	2004	Intel Corp. v. Advanced Micro Devices Inc.	EC	✓	✗	✗
4	2007	In re Rubber Chemicals Antitrust Litigation	EC	✗		✓
5	2008	In re Chocolate Confectionary Antitrust Litigation	Canada*	✗		✓
6	2010	In re Payment Card Interchange Fee Antitrust Litigation	EC	✗		✓
7	2011	In re TFT-LCD (Flat Panel) Antitrust Litigation	EC, JFTC	✗		✓
8	2011	In re Air Cargo Shipping Services Antitrust Litigation	EC	✗		✓
9	2012	In re Flat Glass II Antitrust Litigation	EC	✓	✓	✓
10	2015	Motorola Mobility LLC v. AU Optronics Corp.	KFTC, Belgian NCA	✓	+/- <sup>‡</sup>	✓

<sup>†</sup> ACCC did not file a formal amicus brief. The defendants submitted an affidavit of ACCC's Chief Executive Officer. Since it was a statement created for the purposes of this litigation and served as a *de facto* amicus brief it is included in this listing.

\*The brief was formally filed by the Attorney General of Canada, but it represents the interests of the Director of Public Prosecutions and the Competition Bureau (as explicitly stated in its first paragraph), and hence it is included in this listing.

<sup>‡</sup>The brief of the U.S. was submitted in support of neither party.

Foreign antitrust agencies were reasonably successful in convincing U.S. courts that the sought discovery should at least be limited in scope. This might have been facilitated by the requirement, under *Aerospatiale*,<sup>108</sup> to consider foreign interests before ordering extraterritorial discovery. However, the foreign amici did not manage to convince U.S. courts to adopt a general rule against discoverability of such documents.<sup>109</sup> Given the frequent representations of foreign antitrust agencies before U.S. courts on this matter (as compared with other issues raised by them in the same period), the issue of discoverability of foreign investigations-related documents

<sup>108</sup> In re Société Nationale Industrielle Aérospatiale, 482 U.S. 522 (1987).

<sup>109</sup> See also discussion in SPENCER WEBER WALLER & ANDRE FIEBIG, ANTITRUST AND AMERICAN BUSINESS ABROAD § 14:26 (West Group 2014).

emerges as one of the most topical issues in international antitrust, calling for its more systemic resolution.<sup>110</sup>

### 3. The issue of deference

A foreign state is no ordinary amicus filer. Firstly, it is best placed to comment on its own laws, procedures, and policies. Secondly, its public statements—such as amicus briefs—are unilateral acts under international law. They may serve as a reference point in determining rules of customary international law.<sup>111</sup> Therefore, their relevance extends beyond a particular case. Moreover, from the practical perspective the way of handling foreign states' submissions may have spillover effects in international relations.

The latter issue transpired in the *Uranium* litigation.<sup>112</sup> In this politically charged case a number of foreign nations filed briefs at the district court level. The foreign defendants defaulted and the court entered judgments against them. In this context, on appeal—after further amicus representations had been made—the judge commented that the defaulters instead of defending their case chose ‘to present their entire case through surrogates ... and shockingly to us, the governments of the defaulters have subserviently presented for them their case’.<sup>113</sup>

That comment led to a formal intervention of the Legal Adviser of the State Department in the Justice Department and subsequent communication between the U.S. Associate Attorney General and the 7<sup>th</sup> Circuit Court.<sup>114</sup> The Assistant Attorney General underlined that since the change of practice regarding presentation of foreign states' views before U.S. courts in 1978<sup>115</sup> the

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<sup>110</sup> See further Caroline Cauffman, *The Interaction of Leniency Programmes and Actions for Damages*, 7 COMPETITION LAW REVIEW 181 (2011).

<sup>111</sup> For example, in the recent *InnoLux* case before the Court of Justice of the European Union the Advocate General Wathelet, in his advisory opinion, when dealing with the question of territorial scope of application of EU law referred to the amicus brief submitted by the Belgian competition authority in *Motorola Mobility*, calling for restrictive interpretation in accordance with the principle of international comity. The AG Wathelet noted also similar submissions made in that case by Taiwan and Japan. Case C-231/14 P, Opinion of Advocate General Wathelet in case *InnoLux v. Commission*.

<sup>112</sup> *Uranium Litigation*. The case concerned an international cartel of uranium producers, created under patronage of foreign governments in response to the U.S. ban on importation of uranium. ROSENTHAL & KNIGHTON, *supra* n 85, at 20. The Justice Department initiated an extensive grand jury investigation yet it ultimately refrained from seeking any incitements of foreign companies or individuals. The following controversies and foreign states' amicus participations concerned private suits, which were eventually settled out of court. DEBORA L. SPAR, *THE COOPERATIVE EDGE: THE INTERNAL POLITICS OF INTERNATIONAL CARTELS* 121 (Cornell University Press 1994).

<sup>113</sup> *Uranium Litigation*, *supra* n 32, at 1256.

<sup>114</sup> *Letter from the U.S. Associate Attorney General John H. Shenfield to Clerk of the U.S. 7th Circuit Court of Appeals Thomas F. Strubbe, including the Letter from the Legal Adviser of the Department of State Roberts B. Owen to the U.S. Associate Attorney General John H. Shenfield* (March 18, 1980), on file with the author.

<sup>115</sup> See discussed in Section III.1.

State and Justice Departments have ‘consistently encouraged’ foreign governments to submit their views directly to courts. The Legal Adviser was more explicit, underlining that the ‘language [of the Court] has caused serious embarrassment to the [U.S.] in its relations with some of [its] closest allies.’ He noted that the contentious issues ‘transcend[ed] the particular case or the interests of the defaulting companies’ and that the encouragement of foreign states’ amicus filings was ‘rooted in important considerations of public policy’. The Legal Adviser concluded that ‘it is [the State Department’s] belief that in future proceedings in this and other cases, the court should give due consideration to the views of interested foreign governments and take into account appropriate considerations of comity where there is possible conflict between the laws or policies of nation states’. The importance of due deference was later restated in a ‘formal statement of interests’ filed on remand by the U.S. Associate Attorney General.<sup>116</sup> The statement recognized that the views presented by foreign states in amicus briefs ‘are entitled to appropriate deference and weight in resolving legal questions that turn, at least in part, on considerations of international comity.’<sup>117</sup>

The *Uranium* litigation was settled.<sup>118</sup> Shortly afterwards another similar private suit was brought against a number of U.S. and UK defendants.<sup>119</sup> The UK government submitted an amicus, protesting against the extraterritorial assertion.<sup>120</sup> The State Department filed its own statement of interests, aware of the affront to foreign states in the earlier case.<sup>121</sup> It underlined that filing an amicus brief is the appropriate mechanism for foreign states to communicate their views to U.S. courts. It warranted that ‘serious foreign relations concerns could arise if those governments [whose interests were involved] were denied a means of communicating their views to the judiciary.’ Referring to the earlier case of *Timberlane*,<sup>122</sup> the note pointed out that in cases

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<sup>116</sup> Letter of John H. Shenefield, Associate Attorney General to Hon. Prentice H. Marshall of May 6, 1980, reprinted in 5 TRADE REG. REP. (CCH) ¶50,416 (Transfer Binder 1969-1983).

<sup>117</sup> *Id.*, citations omitted.

<sup>118</sup> SPAR, *supra* n 112, at 121.

<sup>119</sup> *Washington Public Power Supply System v. Western Nuclear*, No. C81-1362M (W.D. Wash. 1983).

<sup>120</sup> Extracts of the brief are reprinted in Geoffrey Martson, *United Kingdom Materials on International Law 1982*, 53 BYIL 337, 455-58 (1983).

<sup>121</sup> The important parts of the Department of State statement of interests were reprinted in Marian Lloyd Nash, *Contemporary Practice of the United States Relating to International Law*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 135, 136-37 (1983).

<sup>122</sup> *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977). This was one of the first cases since *Alcoa*, in which a U.S. courts explicitly recognized the necessity of accommodating foreign states’ interests when asserting extraterritorial jurisdiction in antitrust. That approach was shared more broadly by the U.S. legal community. It was reflected in the influential Foreign Relations Law Restatement. AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD): FOREIGN RELATIONS LAW OF THE UNITED STATES Sections 402 and 403 (American Law Institute Publishers 1987).

perceived by foreign states as affecting their sovereign interests and in which comity considerations are relevant as a matter of law ‘the views and representations of the foreign government should be afforded appropriate deference and weight’.

The U.S. government’s reactions to the treatment of foreign states’ amicus briefs sent a clear signal. Irrespective of whether a court shares the views presented by a foreign state, such communications are, at the minimum, to be handled in a respectful manner. If pertaining to issues of international comity, such filings are entitled to a level of deference.

Similar issues reemerged in *Matsushita*,<sup>123</sup> a protracted case involving allegations of predatory pricing of Japanese imports. In 1975, when the case was pending before the district court, the Japanese government presented its views on the underlying issues of Japanese law and policy (also regarding state compulsion) in a statement passed on to the court via diplomatic channels. While the lower court acknowledged the Japanese position, the Court of Appeals dealt with the case—to use the language of the Japanese government from its brief filed before the Supreme Court—‘never mentioning [the statement] and disregarding its contents’.<sup>124</sup> Japan protested, arguing that ‘formal representations of foreign governments concerning their sovereign acts are to be given conclusive effect.’ It claimed that ‘once a friendly foreign nation has declared the substance and scope of its own domestic law and governmental activity, a United States court is to respect that declaration.’<sup>125</sup>

Australia, Canada, France and the UK filed a joint amicus in this case—the first ever joint foreign states’ submission before U.S. courts.<sup>126</sup> Unlike in most other cases, the amici were not the defendants’ home states. These were the states which experienced an affront in the *Uranium* litigation.<sup>127</sup> They participated in *Matsushita* out of ‘great concern’ over ‘the refusal of the Court of Appeals ... to give dispositive weight to, or even to acknowledge’ the Japanese representations.<sup>128</sup> They considered it ‘inconsistent with the fundamental international legal principle of mutual respect of the sovereignty of friendly foreign governments within their own

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<sup>123</sup> *Matsushita*, *supra* n 3.

<sup>124</sup> Brief of the Government of Japan as Amicus Curiae in Support of the Petition for A Writ of Certiorari, *Matsushita Electric Industrial Co. v. Zenith Radio Corp. (Matsushita)*, *supra* n 25, at 4.

<sup>125</sup> Motion for Leave to File Brief Amicus Curiae and Brief for the Government of Japan as Amicus Curiae in Support of Petitioners, *Matsushita Electric Industrial Co. v. Zenith Radio Corp. (Matsushita)*, 1985 WL 669664, 7-8 (U.S. 1985).

<sup>126</sup> Joint Amicus Brief of Australia, Canada, France, and the UK in *Matsushita*, *supra* n 45.

<sup>127</sup> Australia, Canada and the UK filed the amicus brief, whereas France limited itself to diplomatic interventions.

<sup>128</sup> The foreign amici also supported the petitioners’ position on the foreign sovereign compulsion and act of state defences.

territory.<sup>129</sup> The amici argued that since the Supreme Court had in the past relied on statements of U.S. states, friendly foreign nations' communications should be accorded at least the same weight,<sup>130</sup> especially when focusing on their own regulatory actions or frameworks. They claimed that it would be unacceptable for a sovereign to have such matters determined by foreign courts.<sup>131</sup> The amici also argued that the act of state doctrine prohibited courts from adjudicating veracity of foreign governments' official statements relating to issues of national policies.<sup>132</sup>

The issue of deference was also discussed in *Matsushita* in the U.S. Solicitor General, Justice and State Departments' joint submissions,<sup>133</sup> which maintained that the Japanese brief should be accorded *a dispositive weight*.<sup>134</sup> The position was that 'once a foreign government presents a statement dealing with subjects within its area of sovereign authority ... American courts are obligated to accept that statement at face value; the government's assertions concerning the existence and meaning of its domestic law generally should be deemed "conclusive."<sup>135</sup> That was not to apply to ambiguous or inconsistent statements. Additionally, in the case of a representation which is 'incredible on its face' a court may have to inquire into the underlying circumstances out of concern for integrity of the judicial process.<sup>136</sup>

Recently the question of deference prominently resurfaced in *Vitamin C*<sup>137</sup>—a private suit against a Chinese export cartel. While the allegations were not contested, the defendants argued that the conduct at stake was compelled by the Chinese authorities, enabling them to rely on a foreign state compulsion defense to avoid liability under U.S. antitrust laws.<sup>138</sup> China<sup>139</sup> filed an

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<sup>129</sup> Perhaps not incidentally, the joint foreign amici in *Matsushita* were the very same governments which were earlier involved in the *Uranium Litigation*. In their amicus they recalled the mistreatment of foreign states' filings in that case and referred to the reaction of the State Department.

<sup>130</sup> Joint Amicus Brief of Australia, Canada, France, and the UK in *Matsushita*, *supra* n 45, at 7.

<sup>131</sup> *Id.* at 8.

<sup>132</sup> *Id.* at 10.

<sup>133</sup> Brief for the United States as Amicus Curiae Supporting Affirmance, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (Matsushita), 1985 WL 669663 (U.S. 1985); Brief for the United States as Amicus Curiae Supporting Affirmance, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (Matsushita), 1985 WL 669667 (U.S. 1985).

<sup>134</sup> First Amicus Brief of the U.S. in *Matsushita*, *supra* n 133, at 6, 17-18.

<sup>135</sup> Second Amicus Brief of the U.S. in *Matsushita*, *supra* n 133, at 23, citations omitted.

<sup>136</sup> *Id.* at 23.

<sup>137</sup> *In re Vitamin C Antitrust Litigation*, *supra* n 12.

<sup>138</sup> For more on this defence see Marek Martyniszyn, *A Comparative Look on Foreign State Compulsion as a Defence in Antitrust Litigation*, 8 COMPETITION LAW REVIEW 143 (2012), available at <http://ssrn.com/abstract=1986032>.

<sup>139</sup> All communications were formally presented on behalf of the Ministry of Commerce of the People's Republic of China in its capacity as a cabinet level department of the Chinese government. For the sake of simplicity these communications are referred to in this text as filings of China.



amicus, in which it explained the regulatory framework and acknowledged the alleged compulsion. It also argued that its brief should be given a dispositive effect. Ruling on the motion to dismiss the complaint, the court found that while the brief was entitled to substantial deference, it was not to be taken as conclusive in light of the submitted documentary evidence contradicting it.<sup>140</sup> As the litigation developed, China submitted further communications. When requested to rule on the motion for summary judgment, the court considered that a foreign state's submission is not entitled to 'absolute and conclusive deference in all circumstances and that further inquiry behind [the] statement is permissible.'<sup>141</sup> Having analyzed the Chinese submissions, the court declined to defer to them. It found that one of them did 'not read like a frank and straightforward explanation of Chinese law. Rather, it [read] like a carefully crafted and phrased litigation position.'<sup>142</sup> It seemed to be 'a post-hoc attempt to shield defendants' conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question.'<sup>143</sup> When the case was moving to trial, the defendants sought to have the Chinese submissions presented as evidence. In this context, the court found 'ample ... reasons' (among them lack of Chinese impartiality) to consider the filings untrustworthy,<sup>144</sup> ultimately finding them inadmissible. The case went to trial and a jury found the defendants guilty of price-fixing.<sup>145</sup>

On appeal, the judgement was vacated. The Second Circuit Court of Appeals reversed the denial of the original motion to dismiss, ordering dismissal with prejudice on international comity grounds.<sup>146</sup> It held that 'when a foreign government ... directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements.'<sup>147</sup> In the Second Circuit's view deference rules out any challenge to

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<sup>140</sup> In re Vitamin C Antitrust Litigation, *supra* n 12.

<sup>141</sup> In re Vitamin C Antitrust Litigation, 810 F.Supp.2d 522, 542 (E.D.N.Y. 2011).

<sup>142</sup> *Id.* at 552.

<sup>143</sup> *Id.* The court also refused to permit an interlocutory appeal, also on the question of deference due to the Chinese submissions. In re Vitamin C Antitrust Litigation, 2012 WL 425234 (E.D.N.Y. 2012).

<sup>144</sup> In re Vitamin C Antitrust Litigation 2012 WL 4511308, 3 (E.D.N.Y. 2012).

<sup>145</sup> The defendants were ordered to pay over \$150 million in treble damages. In re Vitamin C Antitrust Litigation, 2013 WL 3369106 (E.D.N.Y. 2013).

<sup>146</sup> Rather than focusing exclusively on the issue of foreign state compulsion, the Court of Appeals addressed this case through the prism of international comity, reading *Hartford Fire* narrowly and considering the issue of compulsion one of the factors which may warrant abstention from adjudication. In re Vitamin C Antitrust Litigation, 2016 WL 5017312 (2nd Cir. 2016).

<sup>147</sup> *Id.* at 9.

such foreign state's representations regarding its laws or regulations.<sup>148</sup> Hence, the Court adopted a very high standard of deference. Little guidance was offered on what criteria should be used in evaluating whether an interpretation of domestic rules proposed by a foreign government is to be seen as reasonable. However, the Court recognized that deference may be inappropriate when there is 'no documentary evidence or reference of law' supporting the proffered interpretation.<sup>149</sup> In the pending case the Second Circuit considered the Chinese explanations of the contentious terms to be reasonable, despite the reservations made by the lower court. The application of the recognized high standard of deference led, in effect, to the finding that the Chinese authorities compelled the price-fixing of exports. Given the defendants' impossibility to comply with both the Chinese and U.S. laws, the Second Circuit found that the lower court erred by not abstaining from adjudication.

In *Animal Science*,<sup>150</sup> a case against a Chinese export cartel of magnesite-based products producers, the defendants in their defense (the crux of which was the alleged state compulsion) relied on Chinese briefs in *Vitamin C* submitted at the lower court level. The district court found that a foreign state's 'admission of legal compulsion of its subjects might warrant a high—often, nearly binding—degree of deference'.<sup>151</sup> In the case context it distinguished between: (1) the Chinese authorities' statements regarding their own regulatory directives<sup>152</sup> and (2) their interpretations of directives and statements made by others (in this case a subordinate chamber of commerce). The court held the former to be the final authority on the matter, unless disproved by Chinese legal provisions or other official statements. The latter were to be assessed in light of other evidence in order to clarify their reliability.<sup>153</sup> The judgment was later vacated on other grounds.<sup>154</sup> These findings in *Animal Science* concerning deference were made while *Vitamin C* was ongoing. These recent cases involving Chinese defendants and the official communications of the Chinese government differently assessed by U.S. courts show that the issue of deference remains both practically important and still unresolved.

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 9, n 8.

<sup>150</sup> *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010).

<sup>151</sup> *Id.* at 426.

<sup>152</sup> 'It would be unseemly of this Court to claim that it could determine the scope or the goals of the [Chinese Ministry's] directives ... better than the [Ministry] itself.' *id.* at 429.

<sup>153</sup> *Id.*

<sup>154</sup> *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp.*, 2011-2 Trade Cas. (CCH) P77,566 (3rd Cir. 2011).

Difficulty of another type arose in *Motorola Mobility*,<sup>155</sup> a private suit for damages against foreign price-fixers, which focused on the jurisdictional question. Four foreign states' amici participated, among them the Japanese METI, protesting against the sought extraterritorial assertions, which were to unreasonably interfere with sovereign authority of other nations and violate international law.<sup>156</sup> However, the Japanese Fair Trade Commission (JFTC) in *Cathode Ray Tube*, in 2009 and 2010, applied Japanese antimonopoly laws extraterritorially in an even more contentious context.<sup>157</sup> This situation shows that different state organs may take different, potentially even contradicting positions on the same issue. In the amicus curiae context it requires courts to be observant and willing to seek further advice and necessary clarifications in case of any ambiguities.

Antitrust cases in the U.S. are decided by general courts, which have to cope with challenges posed by often highly complicated factual matters. The relative growth in foreign states' amicus filing puts additional strain on the U.S. judges. The lower courts, in particular, may not be acquainted with handling foreign sovereigns. When faced with foreign states' submissions, courts should be respectful in the way they handle such engagement. Judges should be most accommodating, especially from a procedural perspective. A foreign state should be given ample opportunity to present its views and arguments. The current practice of lower courts in the U.S. offering foreign states more leeway in terms of the filing's form (formal amicus briefs v. letters to the court, possibility of filing response briefs, etc.) or appearances (at the oral argument or in-court conferences) is a welcomed development.<sup>158</sup> It is also natural that such flexibility decreases as the litigation moves into higher courts. While being stricter in terms of the form of a foreign state's involvement, higher courts should remain cognizant of the special nature of foreign states' amici. Even a perceived disrespect in the way in which such communications are handled may have

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<sup>155</sup> *Motorola Mobility*, *supra* n 10.

<sup>156</sup> For discussion in that context see notes 97-105 and accompanying text.

<sup>157</sup> The case concerned a South-East Asian cartel fixing prices of components used in televisions. Foreign subsidiaries of Japanese firms purchased the affected components outside Japan and the large majority of finished products was sold *outside* Japan. The JFTC had, nevertheless, fined a number of foreign cartelists and issued cease and desist orders. JFTC, *Cease-and-Desist Order and Surcharge Payment Orders against Manufacturers of Cathode Ray Tubes for Televisions* (October 7, 2009), available at <http://www.jftc.go.jp/en/pressreleases/yearly-2009/oct/individual-000037.html>; JFTC, *Cease-and-Desist Order and Surcharge Payment Orders against Manufacturers of Cathode Ray Tubes for Televisions (follow-up report)* (March 29, 2010), available at <http://www.jftc.go.jp/en/pressreleases/yearly-2010/mar/individual-000136.html>.

<sup>158</sup> For example, in *Vitamin C* litigated in the District Court for E.D. New York China submitted a formal amicus brief as well as a number of follow-on statements, which were given the Court's consideration. The case docket shows that it was also granted a general right to take part in conference hearings (without the need to secure permission each time) and that it had the Court's assent to attend the oral argument.

unpalatable spillover effects, extending beyond a particular case. They may also include a similar, reciprocal treatment of the U.S. government by foreign courts.<sup>159</sup>

However, foreign states' statements which are prone to multiple interpretations or contradicted, directly or indirectly, by admissible evidence should be subject to further consideration. Independent expert advice should be sought in cases posing challenges relating to different regulatory regimes. Investigated submissions should carry such weight as is appropriate in light of any remaining interpretative doubts. Given that the past policy change (encouraging foreign states to express their views directly before U.S. courts)<sup>160</sup> helped also to judicialize the process, there is no reason why foreign states' assertions—from a factual perspective—should be given privileged treatment in the adjudicative process.

#### **4. The U.S. government's participation**

The U.S. government's amicus submissions in antitrust cases represent discretionary decisions to become involved in private actions. The exceptions are the instances in which the Supreme Court seeks the government's views before deciding on a petition for certiorari. Such invitations are always accepted.<sup>161</sup> Sometimes lower courts also request to hear the views of the U.S. government, but these are rarer cases. For reasons of economy, the government's participation is very selective. It is undertaken 'solely to represent the public interest'.<sup>162</sup> Drafts are normally first prepared by the Antitrust Division's Appellate Section.<sup>163</sup> After any consultations with other departments and agencies the Solicitor General revises and files the brief.<sup>164</sup>

Among the analyzed 28 antitrust cases there were eight cases in which the U.S. government participated as amicus and three cases brought by the DoJ (see Table 7 below). In all of these eleven cases, the outcome—on the point found contentious by the foreign amici—was in line with

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<sup>159</sup> As explicitly recognized in a State and Justice Departments amicus brief in *Belize* 'The United States also has a significant interest in the treatment of foreign states in U.S. courts by virtue of the reciprocal treatment of the United States Government by the courts of other nations.' Brief of the United States as Amicus Curiae in Support of Defendant-Appellant, *Belize Telecom, Ltd. et al v. Government of Belize* No. 05-12641-CC (11th Cir. 2005). Available at <http://www.state.gov/s/l/2005/87217.htm>.

<sup>160</sup> See Section III.1.

<sup>161</sup> Catherine G. O'Sullivan, *Participation by the United States as Amicus Curiae in Private Antitrust Litigation: An Overview of the Process*, 1-2 (US Department of Justice 2004), available at <http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/programs/spring-04/saec-osullivan.pdf>.

<sup>162</sup> *Id.* at 3-4.

<sup>163</sup> The Section prepares drafts of both the appellate and district court filings. *Id.* at 9.

<sup>164</sup> *Id.* at 2.

U.S. interests as represented by the U.S. government. This suggests that although the majority of internationally-contentious antitrust cases in which foreign states participated are private, the views of the U.S. carry significant weight and if presented to a court they are likely to be accommodated.<sup>165</sup> This is certainly so in the case of submissions on questions of international law and foreign relations. Courts' deference to the executive branch in this context may be explained by the desirability of the U.S. to speak with one voice and the fact that it is the executive branch which later may have to answer for any alleged breach of international law by the U.S.<sup>166</sup> and any adverse consequences in its international dealings. The lack of U.S. involvement in a transnational case may—and should—be read by courts as a signal that the administration does not see a reason why the case deserves any special treatment.<sup>167</sup>

The judiciary's deference to the executive branch also suggests that the inter-governmental—or in the antitrust context, inter-agency—communication is very important. Foreign states' lobbying of and collaboration with the U.S. government (not only the DoJ but also other executive agencies) may preempt conflicts. It can significantly impact private actions if the U.S. government formally takes a stance supporting a foreign state's arguments. It may influence public enforcement efforts by filtering out sensitive issues or controversial cases.<sup>168</sup> That may be why there were only three cases of public enforcement in which foreign states submitted briefs. This potential of preempting controversies inter-governmentally is well-illustrated by both the older (such as the *Uranium litigation*<sup>169</sup>) and more recent cases. A good example of the latter are the Chinese export

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<sup>165</sup> Some authors argue that in the field of antitrust the Supreme Court's decisions were predominantly in line with the U.S. government's amicus filings, with some major exceptions, such as in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Michelle Messer, *Regulating Antitrust as Amicus: The Government's Role in Private Enforcement Actions Before the Supreme Court*, 3-4 (Yale Law School Student Prize Papers No. 23, 2007), available at [http://digitalcommons.law.yale.edu/ylsspps\\_papers/23/](http://digitalcommons.law.yale.edu/ylsspps_papers/23/). This is also in line with the general influence of the U.S. executive's amicus briefs. For example, Segal concludes that 'parties supported in amicus briefs by the solicitor general exhibit spectacular success rates in cases before the Supreme Court'. Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General during the Warren and Burger Courts: A Research Note*, 41 THE WESTERN POLITICAL QUARTERLY 135, 142 (1988). See also discussion in Ryan C Black & Ryan J Owens, *The Solicitor General and the United States Supreme Court: Executive Influence and Judicial Decisions* (2012), available at [http://www.law.uchicago.edu/files/files/SG\\_Chicago\\_Paper-1.pdf](http://www.law.uchicago.edu/files/files/SG_Chicago_Paper-1.pdf).

<sup>166</sup> Eileen Denza, *The Relationship between International and National Law in INTERNATIONAL LAW*, 423 (Malcolm D. Evans ed., OUP 2014).

<sup>167</sup> This point is well-illustrated by the State Department response to the Australian request to take a position in *Conservation Council*. See n 22 and the accompanying text.

<sup>168</sup> From a public international law perspective, foreign state participation at such an early stage, if pertaining to questions of international law, can be seen as an anticipatory protest, which aims at influencing the conduct of the addressee. Krzysztof Skubiszewski, *Unilateral Acts of States*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS*, 227 (Mohammed Bedjaoui ed., Martinus Nijhoff 1991).

<sup>169</sup> In this context see above notes 112-118 and accompanying text.

cartels' cases.<sup>170</sup> The conduct at stake was challenged in private actions, but it was not subject to any civil or criminal prosecution by the Justice Department.<sup>171</sup>

**Table 7 U.S. Government Participation v. Case Outcome**

No	Year	Case Name	Did U.S. file a brief ?	Was it amicus-friendly?	Was the case outcome amicus-friendly?	Outcome in line with the U.S. interests?
1	1978	Pfizer Inc. v. Government of India	✓	✓	✓	✓
2	1986	Matsushita Electric Industrial Co. v. Zenith Radio Corp.	✓	✓	✓	✓
3	1994	Hartford Fire Insurance Co. v. California	✓	✗	✗	✓
4	1997	US v. Nippon Paper Industries Co.	<b>P</b>		✗	✓
5	2004	F. Hoffmann- La Roche Ltd v. Empagran	✓	✓	✓	✓
6	2004	Intel Corp. v. Advanced Micro Devices Inc.	✓	✗	✗	✓
7	2005	U.S. v. Gosselin World Wide Moving, N.V.	<b>P</b>		✗	✓
8	2006	Stolt-Nielsen S.A. v. U.S.	<b>P</b>		✗	✓
9	2011	Spectrum Stores, Inc. v. Citgo Petroleum Corp.	✓	✓	✓	✓
10	2012	In re Flat Glass II Antitrust Litigation	✓	✓	✓	✓
11	2015	Motorola Mobility LLC v. AU Optronics Corp	✓	+/- <sup>‡</sup>	✓	✓

**P** = public enforcement

<sup>‡</sup> The brief of the U.S. was submitted in support of neither party

## V. Functions of foreign states' amicus briefs

Nation states—the prime actors in the international legal system—rarely appear before foreign national courts.<sup>172</sup> Amicus curiae participation is one such exception.<sup>173</sup> Foreign states' amicus submissions serve a number of useful functions. They may facilitate adjudication and lead to better-informed outcomes. This is particularly so in transnational cases, in which appreciation of

<sup>170</sup> See notes 137-154 and accompanying text.

<sup>171</sup> However, the U.S. challenged China also (but not only) for the same conduct in the World Trade Organization framework. WTO Appellate Body, *China- Measures Related to the Exportation of Various Raw Materials*, WT/DS394/13, WT/DS395/13, WT/DS398/12 (December 8, 2011). See Martyniszyn, *supra* n 88, at 214-15. It can be also argued that the U.S. agencies did not bring criminal antitrust charges due to the applicable high standard of proof (beyond reasonable doubt), but they had also abstained from bringing a civil case, which would be subject to a lighter regime (preponderance of evidence).

<sup>172</sup> GERNOT BIEHLER, *PROCEDURES IN INTERNATIONAL LAW* 185 (Springer 2008).

<sup>173</sup> States also appear before national courts with regard to their private or commercial activities (*acta de jure gestionis*). For more on this category of acts see HAZEL FOX, *THE LAW OF STATE IMMUNITY* 35 (OUP 2nd ed, 2008).

foreign laws, procedures, and policies may be challenging. The foreign state itself is best equipped to explain and comment on its own measures. By providing such opportunities, some of the unnecessary friction in international relations may be avoided or at least decreased. Moreover, from a collaborative perspective, amicus briefs allow concerns to be voiced and considered on an *ad hoc* basis. This is a valuable function, even if only as a matter of good neighborliness.<sup>174</sup>

Looking through the lens of international law, amicus briefs are unilateral acts of states.<sup>175</sup> They are one of the tools shaping international law, by expressing states' understanding of the scope of existing and emerging principles and customary norms.<sup>176</sup> Furthermore, such foreign states' representations may constitute protest under international law (if pertaining to such questions),<sup>177</sup> which in turn overcomes any assumption of acquiescence to or tolerance of a particular practice.<sup>178</sup> A protest may influence the development of international law also by preventing recognition of a new customary norm.<sup>179</sup> Hence amicus briefs' significance may extend beyond individual cases and this potential has been recognized.<sup>180</sup>

Similarly, a lack of a foreign state's amicus participation in a suit presented by a party as endangering the foreign state's important interests or contentious questions of international law may be read by courts as the lack of support of the raised claims or defences.<sup>181</sup> Silence speaks volumes, especially in the case of states which are known to appear before U.S. courts.<sup>182</sup>

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<sup>174</sup> CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* 207-08 (OUP 2008).

<sup>175</sup> For in-depth analysis of unilateral acts see Skubiszewski, *supra* n 168.

<sup>176</sup> Art. 38(b) of the Statute of the International Court of Justice provides that international custom should constitute 'evidence of a general practice accepted as law'.

<sup>177</sup> In this vein FOX, *supra* n 173, at 17-18. Arguments advanced in amicus briefs of natural or legal persons will not carry such significance under international law.

<sup>178</sup> For more on protest and acquiescence see MALCOLM N. SHAW, *INTERNATIONAL LAW* 89-91 (CUP 6th ed, 2008); Christophe Eick, *Protest*, in *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (Rüdiger Wolfrum ed., OUP online ed, 2006).

<sup>179</sup> Yet to have effect protest 'must not only be explicit: it should be also maintained and it should manifest itself, whenever possible, in an active attitude.' Skubiszewski, *supra* n 168, at 227.

<sup>180</sup> Ryngaert argues that 'if States intend to oppose the crystallization of a norm of customary international law, they ought to object to *any* decision which might contain such a norm that might *in future* purportedly work to the detriment of their interests [emphasis in the original]'. This is also how Ryngaert explains amicus submissions of various states (protesting against overly far-reaching U.S. extraterritorial tort jurisdiction) in *Sosa*. RYNGAERT, *supra* n 174, at 209, n 88.

<sup>181</sup> As one Court of Appeals observed in relation to an opposition to a discovery order 'we are fully aware that when foreign governments ... have considered their vital national interests threatened, they have not hesitated to make known their objections to the enforcement of a subpoena to the issuing court.' *U.S. v. First National City Bank*, 396 F.2d 897, 904 (2nd Cir. 1968).

<sup>182</sup> The same may not be true for states which do not practise filing amicus briefs, for example, due to limited resources or capacity constraints.

Moreover, amicus filings may be used as a point of reference in other actions and also against the state which originally filed them.<sup>183</sup> In other words, a state which formulates a particular view in an amicus brief, may be later challenged if it itself acts contrary to that position in similar circumstances.<sup>184</sup>

Amicus joint submissions carry additional weight since they already convey a common expression of understanding of contentious issues or—depending on context—a common protest. In other words, they express the coordinated positions of some states. Overall, foreign states’ amicus briefs are a useful tool in the on-going debate shaping international law and the emerging principles of international competition law.

From a practical perspective, foreign states’ amicus submissions help to identify contentious issues. This applies especially to private actions in the U.S. In such a context plaintiffs are strongly incentivized (by rules on damages and discovery<sup>185</sup>) to venture into uncharted (and often foreign) waters by bringing to U.S. courts novel or controversial cases, which often would not be brought by agencies, generally more cognizant of foreign states’ interests and implementing their own policies. In this sense amicus briefs serve as a litmus test determining, for example, the limits of applicability of antitrust laws, whether prescriptive (regarding the ‘length’ of the U.S long-arm jurisdiction, or the subject-matter not covered or nonjusticiable) or relating to enforcement.

Amicus briefs can be also seen as political documents, serving both foreign and domestic political ends. It cannot be precluded that a state participates as amicus before a U.S. court to meet expectations of some local constituencies or lobbying groups, but it does not—at the same time—feel strongly about the contested issue and makes no attempt to intervene with the U.S. government to convince it to file a supporting brief. In this sense, amicus filings are also a political instrument, allowing governments to express disquiet, while allowing foreign legal processes to run their course.

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<sup>183</sup> As Skubiszewski notes ‘publicly made unilateral act can be invoked by all interested States’. Skubiszewski, *supra* n 168, at 232.

<sup>184</sup> For example, in *Motorola Mobility* the Japanese Ministry of Economy, Trade and Industry made a representation, which was largely contradicted by earlier expansive extraterritorial assertions of the Japanese Fair Trade Commission. See notes 155-157 and accompanying text. This discrepancy was noted in the U.S. government’s initial submission in *Motorola Mobility. Supplemental Brief for the United States and the Federal Trade Commission as Amici Curiae, Motorola Mobility LLC v. AU Optronics Corp.*, Docket No 14-08003, at 7.

<sup>185</sup> See above n 65 and accompanying text.



## **VI. Conclusions**

Foreign states' amicus curiae briefs submitted in U.S. antitrust cases sit on the intersection of competition and international law. In the analyzed period of 1978-2015, 67 such foreign nations' participations in 28 cases have been identified and analyzed. The developed nations were the most frequent amicus filers, perhaps due to stronger economic ties with the U.S. or thanks to greater chances of effective relief against defendants based in such fora. Foreign states filed amicus briefs predominantly in private actions. This suggests that the U.S. agencies in their enforcement efforts are cognizant of and accommodating foreign states' interests. Although most briefs were submitted by foreign governments, there is a noticeable trend of individual foreign ministries and antitrust agencies making such representations.

Foreign states participated as amicus curiae before U.S. courts to protect their prerogatives, understood as power to regulate and govern activities of their subjects in a sovereign manner. The decisive majority of amicus briefs were submitted by home states of the defendants. Substantively, the issues which attracted attention and amicus filings were the question of jurisdiction, discoverability of foreign proceedings-related leniency documents, foreign states' implication in anticompetitive conduct and regulation of exploitation of natural resources.

A question which keeps reoccurring and which led to the first ever joint amicus submission of foreign states before U.S. courts is the matter of deference due to such filings. This issue remains unresolved with courts following different approaches. This article argues that such briefs should be handled in a respectful manner and foreign amici should benefit from considerable procedural flexibility. Yet, such submissions need not be accorded a dispositive effect. If prone to multiple interpretations or disputed by otherwise admissible evidence, courts should seek further clarification, independent expert advice and, if appropriate, call on the U.S. executive to hear its views on the contentious issues. Interestingly, the U.S. courts show a great deal of agreement with the executive branch. In the analyzed cases, in which the U.S. administration expressed its position, the outcomes were in line with this.

Overall, amicus briefs are a versatile instrument, potentially serving various legal and political functions. They have the capacity to facilitate adjudication, influence development of international law (for example, by conveying protest), and serve domestic political ends without hampering

foreign legal processes. In more general terms, foreign nations' amicus filings inform the debate on and deepen the understanding of the differences in law and policy between regimes (including particularly contentious issues). They also help to appreciate at which point competition laws give way to broader considerations of political economy and the realm of foreign relations. Over time a growing usage of amicus briefs by foreign states is noticeable. It suggests some, and possibly a growing, degree of trust in the U.S. adjudicative process and the creeping juridification of transnational antitrust disputes, even those affecting foreign states' important interests.